CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF LOUISIANA,

AT

NEW ORLEANS.

IN

NOVEMBER, 1885.

JUDGES OF THE COURT:

HON. EDWARD BERMUDEZ, *Chief Justice.*

Hon. FÉLIX P. POCHÉ,
Hon. ROBERT B. TODD,
Hon. THOMAS C. MANNING,
Hon. CHARLES E. FENNER,
} *Associate Justices.*

No. 9319.

PAUL DOULLUT vs. HUGH MCMANUS.

Vagueness, want of precision, or generality in the averments of a petition, should be taken advantage of by exception before issue joined, unless the opposite party has not therefrom had sufficient notice of the nature of the demand and would be truly surprised. The object of pleading is to notify the adverse party, so that he may be prepared to rebut. He cannot, for the lack of more explicit pleadings, be permitted to exclude pertinent evidence of whose existence and intended introduction he was previously aware.

It is also to serve as record evidence to bar future investigation of same matters between same parties.

A petition for slander which contains a clear statement of the time, place and circumstances, when, where and in what manner the defendant acted, and which sets forth want of probable cause, malice and injury, and a specific money claim, discloses a cause of action.

If, in order to prepare himself, the defendant wishes more explicit allegations, he must require the same by exception filed *before* issue joined. Failing to do so then and in that mode, he cannot object at the trial to the introduction of evidence in support.

APPEAL from the Civil District Court for the Parish of Orleans. *Monroe.*

Sambola & Ducros for Plaintiff and Appellant:

1. A petition for slander needs only contain a concise statement of the cause of action, with circumstances of time and place, and with a claim for damages stated in a round sum. C. P. 172; 4 N. S. 280; 3 L. 290; 3 Ann. 70; 23 Ann. 280.

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2. Any nullity or informality, such as vagueness, want of precision or generality of the averments of the petition can be taken advantage of only by a peremptory exception filed before an answer to the merits. C. P. 343, 344; 1 R. 190; 4 Ann. 537; 10 Ann. 528.

Walter H. Rogers for Defendant and Appellee.

The opinion of the Court was delivered by

BERMUDEZ, C, J. This is an action in damages.

The plaintiff charges that, on April 1, 1884, in this city, at No. 11 North Front street, the defendant did then and there publicly, *falsely* and *maliciously* slander, defame and abuse him, calling him a thief, a fraud, a son of a bitch, a liar, a puppy, using other abusive and defamatory language in the presence and hearing of many other persons; that this conduct of defendant was unprovoked and unjustifiable, and that he, plaintiff, was thereby injured in his feelings and reputation, standing and business, in over five thousand dollars, which he is entitled to recover as real and vindictive damages; which $5000 he claims.

The defendant filed no exception, but pleaded the general issue.

On the day of trial, when plaintiff offered evidence in support of his averments, counsel for defendant objected on the ground that the allegations disclosed no cause of action for the damages claimed; that no allegation of charges, actionable in themselves, had been made, and that no specific damages have been set forth and detailed under which plaintiff could recover.

The court ruled that the objection, as far as it goes to the want of specification of the damage arising from different causes being combined together, are too general properly to put defendant on his guard or to justify the admission of evidence in support.

From a judgment of *non suit*, plaintiff appeals.

The objections to the admissibility of the evidence are twofold: 1st. No cause of action. 2d. No specification of damages said to have been sustained.

The appellee contends that the exclusion of the evidence is justified on those two grounds.

I.

The objection that the petition discloses no cause of action is simply that the averments, if proved, would not warrant the judgment sought.

The petition contains a clear statement of the time, place and circumstances of the occurrence. It specifies the words used. It charges malice, want of provocation, and absence of all justification. It values the damages, real and vindictive, at a round sum, and prays for corresponding relief.

It is clearly sufficient to place the defendant in possession of the nature of the facts proposed to be proved and to enable him to prepare his defense.

It is manifest that, if on the trial, the plaintiff supports his allegations by legal proof, he will be entitled to a judgment. C. P. 172; 4 N. S. 280; 3 L. 290; 3 Ann. 70; 23 Ann. 280; 3 L. 207; 2 R. 365; 5 R. 116; 8 R. 51; 16 L. 389.

II.

The objection that the claim for specific damages has not been set forth and detailed under which plaintiff can recover, is likewise unfounded. That omission could not justify the exclusion of the evidence.

It is well settled that vagueness, want of precision, or generality in the averments of a petition, should be taken advantage of by exception, which should be filed *in limine* before answer to the merits, unless the opposite party had therefrom no sufficient notice of the nature of the demand and would be surprised.

The object of pleading is to notify the adverse party so that he may be prepared to rebut. He cannot, for the lack of more explicit pleadings, exclude pertinent evidence, of whose existence and intended introduction he was previously aware.

It is also to serve as record evidence of matters once decided, so as to bar their future investigation. 6 M. 649; 4 N. S. 277; 7 N. S. 354; 17 L. 238; 5 Ann. 531, 673; 9 Ann. 119, 254; 10 Ann. 528; 12 Ann. 795; 23 Ann. 676.

The rule is different in cases of irrelevant or impertinent averments. The defendant there may either except, in order to have them stricken out, that he may know precisely what he may have to rebut on the trial; or he may wait till the plaintiff offers evidence, and then object. But this rule does not extend to cases of lack of more explicit pleadings, where sufficient averments are made to put defendant on his guard and to justify a judgment on legal proof. 20 Ann. 193; 21 Ann. 273.

It is clear, in the instant case, that the defendant was sufficiently informed of the essential facts on which plaintiff relies to claim damages from him. He could plead surprise to no pertinent fact proved to establish the averments of the petition.

It is likewise positive that a final judgment rendered on the *merits* of this controversy, in favor of either of the litigants, will constitute *res judicata* to any new suit brought on averments similar to those contained in the petition.

Had the defendant deemed it necessary, in order to prepare his defense, to demand a specification of the various items on which plaintiff bases his claim for real and vindictive damages, he ought to have filed before issue joined an exception requiring the same to be set forth and detailed with minuteness.

We conclude that the plaintiff is entitled to be allowed to introduce legal evidence in support of his allegations.

It is therefore ordered and decreed that the judgment appealed from be reversed, and that this case be remanded to the lower court for further proceedings according to law, the appellee to pay costs of appeal; those of the lower court to abide the final determination of the suit.

No. 9422.

G. CORRAL & CO. VS. ECLIPSE TOWBOAT COMPANY.

A party who brings an action must have an actual interest which he pursues.

Hence a ship agent cannot personally recover damages which he charges to have been caused to vessels consigned to him on account of overcharges on towage, when the amounts alleged to have been overcharged were paid by the owners or charterers of the vessels themselves.

APPEAL from the Civil District Court for the Parish of Orleans. *Tissot*, J.

Bayne & Denègre for Plaintiffs and Appellees.

E. D. Craig for Defendant and Appellant:

1. Plaintiffs, suing exclusively for their own benefit, in order to recover, must have an interest in the damages claimed at the institution and during the pendency of the suit. C. P., Art. 15; 1 Rob., 470; 5 A., 263.
2. Agents cannot recover for their principals unless they set up in their pleadings that the suit is instituted on behalf of their principals, and must disclose the names of said principals in their pleadings. 24 A., 18; 28 A., 412.
3. The putting of a debtor in default is, under our law, a condition precedent to the recovery of damages for the violation of a contract. The want of it need not be pleaded, and can at any time be taken advantage of. C. C, 1912; 6 Martin N. S., 229; 3 Rob., 403; 9 Rob., 501.
4. Where there are two parties to a contract and there exists a condition binding upon one of the said parties precedent to the fulfilling the contract by the other, which condition requires the former obligor to do a certain thing on the occurrence of a certain event, and which requires a notice to be given to his obligee of said event, in order that said obligee may know when to act in order to fulfill his part of the contract, and the said obligor neglects to give the said notice as conditioned, the obligee is not bound and cannot be held as having been put in mora, so as to render him liable for the damage because of his passive disregard of the contract. Art. 1913, C. C.; 3 Rob., 403; 11 A., 300.
5. When it is a condition in a contract for towage that the vessel to be towed must sail to the bar in the Gulf of Mexico at the mouth of the Mississippi river, and then give

notice of said arrival to the owners of the towboat, the condition must be *expressly* complied with in order to put the owners in default, and a different notice stating that the vessel had sailed, or was expected to sail, from Havana to New Orleans, and without stating the time of her arrival at the bar, does not fulfill the condition. Arts. 1903 and 1913 C. C.

6. The interests of various parties, distinct and separate, united in the same cause of action by a party plaintiff, would be a misjoinder of parties, and not admissible.

7. When the true intent of a contract or any stipulation thereof is not ambiguous, but is well understood, according to the rules of legal interpretation and language, it must have the effect of law upon the parties, which none but the parties, mutually, can abrogate or modify; neither equity nor usage can be resorted to to restrain that intent, and the courts are bound to give legal effect thereto, according to the true intent of all parties. Compare Arts. C. C. Nos. 1901, 1903, 1913, 1945 and 1963.

T. Gilmore & Sons on the same side.

The opinion of the Court was delivered by

POCHÉ, J. Defendants prosecute this appeal from a judgment condemning them to pay to plaintiff $4329.88 for an alleged violation of a contract, by which they had bound themselves to tow to the city of New Orleans from the Gulf of Mexico and back again, for a term of one year from July 11, 1882, all the vessels which would come to this port on consignment to plaintiffs, at a stipulated price per tonnage for the round trip.

The amount claimed by plaintiffs and allowed by the District Court consists of the sum of $40, spent by them as counsel fees in some litigation growing out of defendant's alleged violation of their contract, and of the difference in towage dues paid by them on vessels consigned to plaintiffs during the year, and the price of such dues as fixed by the contract.

Among other defences, the defendant company urges that under their pleadings plaintiffs have shown no personal rights to claim and recover the amount which forms the judgment of the District Court. In our opinion that defence should have prevailed, and the judgment of the lower court is therefore erroneous. The evidence, which consists, in the main, of plaintiffs' own testimony, shows to our entire satisfaction that the various amounts which form the basis of their demand were paid directly by the owners or charterers of the vessels which were consigned to plaintiffs during the time covered by the contract, and that therefore they incurred no losses on that score through the alleged violation of the contract by the defendant company.

Plaintiffs have utterly failed to allege in their petition, or to intimate in their testimony, that they were pressing this claim as agents, or for the use and benefit of the owners or charterers of the respective

vessels, on which the burden of the alleged overcharges fall and to whom they are due, if recoverable at all.

In his testimony the senior member of plaintiffs' firm distinctly states that he actually or personally lost nothing through the transaction which he declares upon, and that his only losses consist in the loss of business on account of his failure to secure cheap towage on vessels which would in that event have been consigned to him, and whose owners were thereby deterred from consigning to this port, under the control of his firm.

His testimony is clear on that point, and proves beyond a doubt that he has no personal cause of action in claiming the various amounts which form the basis of his demand. Hence plaintiffs cannot maintain their present action, although in a proper action, on proper showing, they may be legally entitled to recover such damages as they may show in consequence of decrease of business as a result of the defendant's alleged violation of its contract, and to that end we shall reserve their rights under our decree.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed; and it is now ordered that plaintiffs' demand be rejected and that their action be dismissed as in the case of non-suit, at their costs in both courts.

Judgment reversed.

No. 9234.

MRS. ELIZABETH BEDELL VS. DAVID CALDER ET AL.

The prescription of four years is a bar to a minor's action against his tutor respecting the acts of the tutorship.

If a provisional account has been rendered by the tutor during the minority and has been homologated, and the minor does not within four years after majority take legal action to finally settle his rights and enforce them, prescription will apply.

If the real property of the tutor has meanwhile passed into the hands of purchasers under forced alienations, they may plead prescription even though the tutor has renounced it.

APPEAL from the Nineteenth District Court, Parish of St. Mary. *Goode*, J.

M. J. Foster and *A. C. Allen* for Plaintiff and Appellant.

D. Caffery for Defendants and Appellees.

The opinion of the Court was delivered by

TODD, J. This is an hypothecary action to enforce a legal mortgage claimed to have resulted from an indebtedness to the plaintiff by her natural tutrix, who is alleged to have owned the land described in the

petition, during the tutorship, and now sought by this suit to be subjected to said mortgage.

Pleas of prescription of four and ten years were filed in the lower court against the demand, and that of four years sustained and the suit dismissed, and from this judgment the present appeal is taken.

Mrs. Célézie Hays, widow of Jothan H. Bedell and mother of the plaintiff, was confirmed as her natural tutrix on the 30th of January, 1860.

On the 12th of May, 1870, the tutrix filed an account of her tutorship in which she stated the balance due the plaintiff at that time to be $8190.58. This account, as between the plaintiff and her tutrix, or as to this particular indebtedness, appears not to have been homologated during the minority of the plaintiff, who became of age in the year 1873.

On the 14th of June, 1880, plaintiff presented a petition to the court asking that this tutorship account, in so far as it concerned her, be approved and homologated and the mortgage resulting from this acknowledged debt of the tutrix be recognized and made executory, and a judgment was rendered in conformity to this prayer on the 28th of April, 1881.

To enforce the mortgage thus recognized the present suit against these defendants was instituted on the 19th of September, 1882.

The question to be decided is whether, under this state of facts, the claim of the plaintiff is barred by the prescription pleaded against it.

Prescription did not run against the plaintiff during her minority. C. C., 3522; Sewell vs. McVay, 30 A., 673.

After the expiration of four years from her majority no action would lie in her favor to compel the rendition of an account by her tutrix, or to change or alter in her favor any account of the tutrix rendered—or, in short, to establish any indebtedness on the part of the tutrix "respecting the acts of the tutorship" not already legally acknowledged or fixed. This we take to be the true intent and meaning of Art. 362 of the Civil Code.

We find, however, that in this instance the indebtedness of the tutrix to the plaintiff, her ward, at the time the latter attained her majority, was liquidated and established by the judicial admission of the tutrix made in her tutorship account as stated. The liability and the debt thus acknowledged stood uncontroverted up to the time plaintiff attained her majority. It was for her after that period to accept or reject it. It is evident that she tacitly accepted it by her silence

and failure to oppose it, and afterward expressly by her motion to have the account homologated. And notwithstanding her long delay in taking this last step she was not debarred from doing so.

At the attainment by plaintiff of her majority the tutorship account filed three years before might be properly regarded as a proceeding pending in court between her and her tutrix, in which the latter as accountant occupied the position of plaintiff and she, the ward, as defendant cited to answer the account. She might at any time, by a simple appearance and answer, have procured the homologation of the account. That she appeared by formal petition to effect this object might appear irregular, but such irregularity did not in fact alter her true position or affect her rights. It could not be regarded as an "action" against her tutrix to fix or establish an indebtedness, for that had already been done by the tutrix's own formal judicial acknowledgement, made in the most solemn form and in the manner prescribed by law. It denoted only an express acceptance on plaintiff's part of what she had always accepted by her previous silence and inaction. The judgment homologating the account only declared the legal effect, with respect to the mortgage, that the law imparted to the debt.

The proceeding to have the account of tutorship homologated and the judgment of homologation both took place before the expiration of the ten years from the plaintiff's majority and were in time.

This suit to enforce the mortgage based on the debt thus recognized was filed the next year.

Our conclusion, under these circumstances, is that the prescription of four years was improperly sustained, and it is quite as clear that the prescription of ten years is equally inapplicable.

It is, therefore, ordered, adjudged and decreed that the judgment of the lower court be annulled, avoided and reversed, and it is now ordered, adjudged and decreed that the case be remanded to that court to be proceeded with according to law, the costs of appeal to be paid by the defendants.

DISSENTING OPINION.

MANNING, J. The plaintiff was of age in May 1873. Her action against her tutrix was filed June 14, 1880, service having been accepted on 12th of the previous month. The present suit was filed September 19, 1882.

I think the action of the minor against her tutrix is barred by the prescription of four years, and her capacity to sue therefore terminated in May 1877.

The voluntary rendition of the account by the tutrix has no effect upon this prescription *quoad* other parties. To hold otherwise will facilitate collusion between parent and child, after majority is attained, and subject purchasers in good faith to disastrous reclamations. If any one must suffer for a mother's waste of her child's money, it should be the child.

I think the judgment should be affirmed.

ON REHEARING.

MANNING, J. The mother of the plaintiff was appointed her tutrix in January 1860 and filed a provisional account of her tutorship in May 1870 shewing that over eight thousand dollars was due the plaintiff. She attained her majority in May 1873.

An abstract of the inventory of the deceased father's estate had been recorded in 1869 and reinscribed in 1879. The tutrix had real estate which by forced alienations had passed into the hands of the defendants. This suit is a hypothecary action to subject that real estate to the claim of the plaintiff against her mother, and was instituted in September 1882.

The prescription of four years is pleaded and that time expired in May 1877 running from the plaintiff's majority. Up to that date no attempt had been made by the plaintiff to enforce her mortgage against her mother's property and no suit had been instituted respecting the acts of her tutorship. It was not until May 1880 that the plaintiff sued her former tutrix (as her counsel's brief says) "with the view of homologating and making executory the account filed two or three years before her majority." Judgment was rendered in that suit in April 1881 and this suit followed in the next year.

The action of the minor against her tutrix is prescribed after four years, Rev. Civ. Code art. 362, and more than that time had elapsed from the plaintiff's majority to her suit in 1880. The account filed by the tutrix in 1870 during the plaintiff's minority was one of those periodical accounts rendered provisionally that are required to be filed every year. Even when homologated, the judgment of homologation is merely *prima facie* evidence of their correctness, and this account was never homologated. It lay dormant until a suit by the Bedell heirs against the widow Bedell was instituted when the amount stated as due by this account was reduced, and that it was not considered determinative of the plaintiff's claims is apparent from her suit in 1880 instituted expressly to obtain an adjudication of them. Such accounts are not conclusive on the minors who may contest them after major-

ity, Lay v. O'Neal, 29 Ann. 722, and they are not therefore a judicial ascertainment of the rights and liabilities of the parties respecting the tutorship. We have lately held after mature consideration that they cannot serve as a foundation for the hypothecary action. Cochran v. Violet, *ante* 221, and in that case we went further than is necessary to hold in this.

The minor is given four years after majority to overhaul these accounts, to contest their correctness, and to compel the tutrix to a settlement. If after this time has elapsed and no legal action has been taken respecting the tutorship, third parties have acquired rights upon the property of the tutrix, the former minor has no one else but herself to blame for not using the first four years of majority in forcing an adjudication of her rights.

The inscription of the inventory of the father's succession in 1869 and its reinscription in 1879 preserved the mortgage of the plaintiff, but could no more keep alive the debt which that mortgage secured than the inscription and timely reinscription of an ordinary mortgage can keep alive a note secured by it. Suit must be brought upon a mortgage note within five years or prescription must otherwise be interrupted or else the note will be prescribed, and the fact that the mortgage is still alive will not save the note.

So long as the relation of tutrix and ward exists prescription does not begin, but whether provisional accounts have been rendered during minority or not, prescription does begin from the majority of the ward, and the Code interposes it as a conclusive bar to any claim respecting the acts of the tutorship, and to protect third persons from collusion between the former tutrix and ward or from failure of the tutrix to use the plea, it was long ago held in a case very similar to this that a third possessor can avail herself of the plea even when the tutor has renounced it. Blanchard v. Decuir, 8 Ann. 504.

The lower court sustained the plea but we reversed that judgment on the first hearing.

It is therefore ordered and decreed that our former judgment be set aside and that the judgment of the lower court is affirmed with costs.

TODD, J. adheres to the opinion read by him on the first hearing.

No. 9388.

WADE R. YOUNG VS. MARIA J. JACKSON.

Damages for slander cannot be awarded when the only evidence of the alleged slander is vague rumors, the origin of which is not traced to the defendant, and she denies ever having uttered the slanderous words.

In the absence of express or implied agreement, an agent is not authorized to *retain* out of the funds of his principal in his hands any amount which may be due him, *unless* the same be for necessary disbursements, expenses and costs, a stipulated commission or a liquidated debt. The law forbids a mandatory from offsetting, except in such cases. R. C. C. 3022-5.

APPEAL from the Tenth District Court, Parish of Tensas.
Reeves, J. *ad hoc*.

Wade R. Young, Plaintiff and Appellee, *proprja persona*.

Percy Roberts and *Steele & Garrett* for Defendant and Appellant.

The opinion of the Court was delivered by

MANNING, J. This action is described by the plaintiff as a suit "for a settlement of accounts and cumulated therewith an action in damages for breach of contract and for slander and defamation of character."

The plaintiff is a lawyer practising in the courts of Tensas. The defendant owns with her children a plantation in that parish and lives in Adams county, Mississippi. She employed the plaintiff in 1878 to take charge of the succession of her deceased husband which she was then administering. The property consisted of a plantation and the usual movables. He was not only to attend to her legal business, but to be her agent and general business-man besides, to secure a factor for her who would supply the plantation, to lease the plantation and collect the rents, in other words to be her factotum as country lawyers usually are for impecunious clients who own plantations and who do not own anything else.

The property had already been mortgaged and was under a lease for three years, but the tenant had not paid the rent for the first year and had made partial default on the rent of the second. Suits were promptly instituted and prosecuted successfully and near ten thousand dollars realized.

Then followed overhauling the succession matters and preparing the accounts, and other leases of the plantation or arrangement with the negro labourers for its cultivation, and finally the great overflow of 1882. Throughout this time down to the spring of 1883 the plaintiff continued rendering his services as lawyer, accountant, land-steward,

agent, business-man, and when he was discharged, the property was out of debt and was yielding a satisfactory rental. For his services during these five and a half years charges were made which are contested. The sums realized by his administration of the business, including the rental for 1883 which he had already arranged, amount to over thirty thousand dollars.

The jury rendered a verdict for the plaintiff for one thousand dollars as damages for the alleged slander, and in the matter of accounts adjusted them by giving to each certain items enumerated in the verdict.

If the plaintiff had been slandered by the defendant as alleged we should not hesitate to affirm the judgment upon that branch of the case, but no evidence was introduced sustaining that charge save the existence of vague rumors floating in the community not traced to her, and she as a witness emphatically denies that she ever used the opprobrious language attributed to her.

Upon the other branch of the case we are not disposed to disturb the adjustment made by the jury, composed as the plaintiff says "of the most intelligent men of the parish who sat patiently throughout the trial for near a week." The largest items and the most objectionable were included in an account made by the plaintiff and rendered the defendant, and were not objected to by her. Her silence then closes her mouth now.

It is therefore ordered and decreed that the item of one thousand dollars damages for slander be eliminated from the verdict of the jury and the judgment of the lower court, and as thus amended that it be affirmed, the plaintiff paying the costs of appeal.

On Rehearing.

Bermudez, C. J Both parties having applied for a rehearing, we re-examined their differences and came to the conclusion that, although the plaintiff had received at our hands what he was entitled to recover, the defendant had apparently valid grounds of complaint, to which full justice had not been done.

We refused the rehearing sought by plaintiff, allowing one to the defendant, but only on the right of plaintiff to charge for services as agent in the years 1882 and 1883.

The defendant urges that the plaintiff is not founded in his demand, because he agreed to make the contracts with the hands of defendant for 1882 and charge nothing whatever for the services.

The evidence shows that the administration of the plantation had been entrusted to S. N. Jones, a competent and remunerated superin-

tendent, and that no service was actually rendered by the plaintiff, not even that of procuring a factor, none being necessary, as this had already been done.

It appears that in the account which plaintiff tendered on April 7, 1883, in which every *item* to which he thought himself entitled had been minutely detailed and placed, he did not charge for his services for 1882.

This omission implies the admission that, in his own estimation, he had acted gratuitously during that year.

This conclusion is fortified by his letter of May 19, 1883, in which plaintiff, referring to his claim for labor and responsibility, states that the payment of the same is left *entirely to defendant's generosity* and that *it is not an object to him.*

The defendant further urges that the plaintiff cannot be listened to ask compensation for 1883, for the double reason that not only did he not render any service, but also that he was discharged for cause by her before one third of the year had gone by; the cause being that he had charged her with a disbursement of $625 55 of her own money in his hands for taxes of 1882 on the plantation, when the fact is, that the deducted sum had never been thus applied, and that the defendant had herself subsequently to pay those identical taxes.

It is unnecessary to determine whether the plaintiff was or not discharged for *cause.* It is clear that if he is not entitled to remuneration for 1882, he cannot, for the same reasons, claim any for 1883.

The record shows that the plaintiff has retained, as his compensation, the sum of one thousand dollars to meet his services for those two years.

He was without authority to retain that sum, in the absence of express or implied agreement, as it did not represent disbursements, expenses and costs, a stipulated commission or a liquidated debt.

The law forbids absolutely an offset by an agent, unless in such cases. R. C. C. 3022, 3023, 3024, 3025.

Our previous judgment allowed the plaintiff $1189 23, and should be reduced by the one thousand dollars illegally retained by him.

It is therefore ordered and adjudged that our previous judgment be amended by allowing plaintiff to recover of defendant one hundred and eighty nine dollars and twenty-three cents only, ($189 23) with costs of the lower court, those of appeal to be paid by him, and that thus amended it remain undisturbed.

No. 9316.

MRS. JESSIE R. BELL VS. RIGGS & BRO.

For the reasons given in State *ex rel.* Bell vs. Judge, 36 Ann., 886, the order dissolving the injunction herein appealed from is annulled and set aside.

APPEAL from the Civil District Court for the Parish of Orleans *Rightor*, J.

Sam'l Gilmore and *Jas. D. Hill* for Plaintiff and Appellant.

Branch K. Miller and *Albert Voorhies* for Defendant and Appellee.

The opinion of the Court was delivered by

FENNER, J. This is an appeal from an order dissolving an injunction on bond, which was granted under our mandamus in the case of State *ex rel.* Bell vs. Judge, 36 Ann., 886.

For the reasons given in that decision it is evident that the dissolving order was erroneous and must be reversed.

It is, therefore, ordered and decreed that the dissolving order appealed from herein be annulled and set aside, at cost of appellee.

No. 9339.

MRS. JESSIE R. BELL VS. A. RIGGS & BRO.

In the matter of ordinary preliminary injunctions the function of fixing the amount of the bond required is confided by law to the discretion of the judge before whom the action is pending.

While this discretion is legal and not arbitrary, and while we might afford relief in cases of oppressive and unreasonable requirements amounting to a denial of justice, yet where the amount fixed is supported by evidence or otherwise evinces a prudent and sincere exercise of his legal discretion, we are not justified in criticising his order and substituting our discretion for that which the law attributes to him alone.

APPEAL from the Civil District Court for the Parish of Orleans. *Rightor*, J.

Sam'l Gilmore and *Jas. D. Hill* for Plaintiff and Appellant.

Branch K. Miller and *Albert Voorhies* for Defendant and Appellee.

The opinion of the Court was delivered by

FENNER, J. In this case a preliminary injunction restraining defendants from erecting a steam engine for the prosecution of their business on their premises was issued on a bond fixed by the judge at the sum of seven hundred and fifty dollars.

Defendants subsequently took a rule to have the bond increased on the ground of insufficiency. After hearing evidence contradictorily between the parties, the judge *a quo* made the rule absolute "in so far as to increase the bond for injunction from the sum of $750 to the sum of $5000," from which order the present appeal is taken.

The right of the judge to increase the amount of the bond upon proper showing that the amount originally fixed was inadequate is too clear to admit of question. The only point involved is the correctness of the order of the judge upon the evidence before him. In ordinary injunctions the law has seen fit to confide the duty of fixing the amount of the bond required to the discretion of the judge having cognizance of the case.

Of course, this is a legal and not an arbitrary discretion, and in case of abuse and denial of justice by unreasonable and oppressive requirements, we should not hesittate to extend relief.

But we find no such case presented here. The ruling of the judge is supported by responsive evidence, and evinces a prudent and sincere exercise of the discretion confided to him by law.

Under these circumstances we would not be justified in criticising the correctness of his appreciation of the evidence before him and in thus substituting our discretion for that which the law attributes to him alone.

Judgment affirmed.

No. 9548.

CONNER & HARE VS. GEORGE M. ROBERTSON.

1. Sales of property for future delivery, with the *bona fide* intention and obligation to make actual delivery, are lawful contracts; but if, under the form of such a contract, the real intent be merely to speculate on the rise or fall of prices, and the goods are not to be delivered, but the contract to be settled on the basis of differences of price, the transaction is a wager and is non-actionable.
2. But in order to affect the contract, the alleged illegal intent must have been mutual, and such intent in one party, not concurred in by the other will not avail.
3. The law presumes lawful purpose until the contrary is proved; and when one party charges illegal intent, the burden of proof is imposed upon him.
4. The validity of the contract depends upon the state of things existing at its date, and is not affected by subsequent agreements under which the parties voluntarily assent to a settlement on the basis of differences.
5. The mere fact that at the date of his contract, the vendor had not the goods, and had made no arrangement for obtaining them and had no expectation of receiving them unless by subsequent purchase, does not suffice to impair the contract. The contrary doctrine, once announced, is now thoroughly overruled.

6. It follows that the failure to identify the particular goods sold does not affect the matter, because the sale is not of ascertained articles, but of articles of a designated kind and quantity to be selected thereafter, which is a lawful contract, when the obligations are reciprocal.

Applying the foregoing principles to the facts of this case, which is a contract for the future delivery of cotton under the rules of the Cotton Exchange of New Orleans, the defense of wagering is not sustained.

APPEAL from the Twenty-first District Court, Parish of Opelousas. *Gates*, J.

R. S. Perry, for Plaintiffs and Appellants.

Breaux & Renoudet, for Defendant and Appellee.

The opinion of the Court was delivered by

FENNER, J. This case involves the legality of transactions in the purchase and sale of cotton for future delivery, conducted under the rules of the Cotton Exchange of New Orleans, and the right of brokers, who act as agents in effecting such transactions, to recover from their principals commissions for their services and losses paid by them in the execution of their mandate for account of said principals.

The New Orleans Cotton Exchange is a corporation chartered in accordance with the laws of the State. Its membership comprises the leading merchants engaged in all the ramifications of the vast cotton trade of the city. It conducts its business in the most splendid building of the metropolis, situated upon one of its important public thoroughfares. Amongst its purposes, as declared in its charter, are the following: "To establish just and equitable principles, uniform usages, rules and regulations, and standards for classification, which shall govern all transactions connected with the cotton trade; to acquire, preserve, and disseminate information connected therewith; to decrease the risk incident thereto, and generally to promote the interests of the trade, and to increase the facilities and the amount of the cotton business in the city of New Orleans."

In execution of these purposes, the Exchange has adopted an elaborate system of "Rules governing contracts for the future delivery of cotton."

These Rules recognize no contracts except for the sale and purchase of cotton to be actually delivered and received at the future period stipulated. They impose upon the seller the absolute obligation to deliver, and on the buyer the absolute obligation to receive the cotton with the single self-evident and superfluous qualification, "that any party holding a contract against another, corresponding in all respects,

except as to price, with one held by the other against him, may close or cancel both by giving notice in writing to the opposite party at any time before notice of delivery," which is an obvious application of the principles of set-off or compensation.

The Rules explicitly discountenance and forbid any contracts dispensing with the obligation of actual delivery, and providing for a mere settlement of differences in price, declaring: "All contracts for the future delivery of cotton shall be binding upon members, and of full force and effect until the quantity and qualities of cotton specified in such contracts shall have been delivered and the price specified in said contract shall have been paid. Nor shall any contract be entered into with any stipulation or understanding between parties at the time of making such contract, that the terms of said contract, as specified in Rule 1, are not to be fulfilled, and the cotton received and delivered in accordance with said rule."

These Rules are, by their own terms and by the terms of the contracts entered into under them, written into the contracts and form as much part of the agreement of the parties as the stipulated price or quantity of the cotton.

They are published for the information not only of members but of outsiders dealing through them, are accessible to all, are referred to in the contracts, and no person dealing thereunder can be allowed to plead ignorance of them.

The facts exhibited in this particular case are the following:

Plaintiffs are members of the Cotton Exchange doing business as Brokers in contracts for future delivery of cotton. They received an order from defendant's brother to sell, for defendant's account, one thousand bales of cotton for delivery in September, 1882. They executed the order by entering into a contract conforming in all respects to the rules of the Exchange, for the sale of one thousand bales deliverable in September, in accordance with said rules, at the price of 11 78-100 cents per pound. Defendant was duly notified of the sale and fully ratified it.

Under the rules, plaintiffs were the guarantors of the contract made for defendant, and were bound to execute it, whether he provided them with the cotton or not.

The price of cotton rose and defendant was called upon to face a loss. He did not comply with the contract made in his behalf nor take any steps to do so. The 23th day of September arrived and his agents were confronted with the necessity of providing for the execution of

their obligations under the contract on the following day. They, therefore, purchased from a member of the Exchange transferrable orders or contracts for the delivery of one thousand bales of cotton due on the following day. They paid for these the market price of the day. They then called upon the holders of the original contract which they had made in behalf of defendant, and effected a settlement with them by which the latter accepted the transferrable orders just purchased and surrendered the contract made for defendant. The difference between the price at which they sold and the price at which they repurchased was fifty-seven hundred and forty 77-100 dollars, which they paid out of their own pockets for account of their principal.

Defendant was immediately furnished with a statement of the transaction showing the amount due by him to plaintiffs on account of his loss and commissions.

He made no objections to the account or to the contract of his agents. His commission merchants in the city made sundry partial payments with his full approval. He sought the assistance of his father to enable him to settle the account which was denied. He finally said that he was broke and could not pay, and then this suit was brought. He now sets up a two-fold defense, viz: First, that plaintiffs were not authorized to make the transaction for him. Second, that the transaction itself was a wagering contract, a mere gambling transaction, affording no basis for a judicial action.

Defendant's own testimony is sufficient to show that he should have spared his conscience the strain of making the first defense, and it needs no further notice.

The questions arising under the second branch of the defense are, in great measure new to this court, but they have been often considered and determined by the courts of England and of the United States. We think there is no substantial difference, at least affecting this case, between the law of Louisiana and the existing law of England and of the other States of the Union on the subject of aleatory or wagering contracts.

We have no concern with the general definitions and provisions of our code on the subject of aleatory contracts. The only question here is whether this is a *non-actionable* aleatory contract, and the only provision of our law affecting *this* question is Article 2983 of the Civil Code, which provides: "The law grants no action for what has been won at gaming or by a bet, except for games to promote skill in the use of arms, such as the exercise of the gun, and foot, horse and chariot racing."

It follows that the only question affecting plaintiff's right of action is whether the cause on which it rests was, in form or substance, "gaming" or a "bet."

This is the precise question which arises under the English statute (8 and 9 Victoria, C. 109, Sec. 18), which in effect declares all contracts by way of gaming and wagering null and void, and renders actions for the recovery of money won on any wager unsustainable. A like rule doubtless prevails generally among the States of this Union.

This is sufficient to show that the decisions of the English and other American Courts as to what constitutes "gaming," or "a bet," or a "wagering contract," are entitled to full considerations as pertinent authorities.

These decisions are numerous and they exhibit quite a *consensus* of opinion on the following governing principles, which we accept and announce with our own full approval.

1. It makes no difference that a bet or a wager is made to assume the form of a contract. Gambling is none the less such because it is carried on in the form or guise of legitimate trade; and if, under the guise of such a contract, the real intent be merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the whole transaction constitutes nothing more than a wager, and is non-actionable. Irwin vs. Willar, 110 U. S. 499; Benjamin on Sales, (Bennett's 3d Am. Edition) § 542, and numerous authorities there cited.

2. In order to affect the contract, the alleged illegal intent must have been mutual, and the intent of one party, not communicated to or concurred in by the other, will not avail. Grizewood vs. Blanc, 11 C. B. 536; Ashton vs. Dakin, 4 Hurlst & Nor. 867; Knight vs. Cambers, 15 C. B. 562; Cassard vs. Hinman, 1 Bosu. 207. 6 Bosu. 8; Kingsbury vs. Kirman, N. Y.; Smith vs. Bouvier, 70 Penn. St. 325; Rumsey vs. Berry, 65 Me. 570; Pixley vs. Boynton, 79 Ill. 351; Clark vs. Foss, 7 Biss. 540; Williams vs. Tiedeman, 6 Mo. App. 269; Sawyer vs. Taggart, 14 Bush. 729.

3. The law presumes that the true intention of parties is that which is expressed upon the face of their contracts, and also that men, in their business transactions, do not intend to violate the law or to make contracts for the enforcement of which the law refuses a remedy. Hence, when one party charges that the contract is infected with an illegal intent, the burden of proof is imposed upon him to establish

this allegation. Irwin vs. Williar, 110 U. S. 499; Frost vs. Clarkson, 7 Cowen, 24; Dykers vs. Townsend, 24 N. Y. 57; Pixley vs. Boynton, 79 Ill. 351; Williams vs. Tiedeman, 6 Mo. App. 269; Rumsey vs. Berry, 65 Me. 570.

4. The validity of the contract depends upon the state of things existing at its date, and is not affected by subsequent agreements under which the parties voluntarily assent to a settlement on the basis of differences in price. Parties to such contracts have the same liberty to settle their transactions by common consent according to their own discretion, which is accorded to parties to other contracts. Clark vs. Foss, 7 Biss. 540; Williams vs. Tiedeman, 6 Mo. App. 269; Sawyer vs. Taggart, 14 Bush. 729; Fareira vs. Gobele, (Penn.) 20 Alb. L. J. 48.

5. The law is now perfectly settled that an executory contract for the sale of goods for future delivery is not infected with the quality of a wager by reason of the fact that, at its date, the vendor had not the goods, and had not entered into any arrangement to provide them, and had no expectation of receiving them unless by subsequently going into the market and buying them.

The contrary doctrine announced by Lord Tenterden in Larymer vs. Smith, 1st B. & C. 1, and Bryan vs. Lewis, R. & M. 386, has been distinctly and repeatedly overruled and now ranks as an utterly exploded legal heresy. Benjamin on Sales, §§ 541, 542, 82, 83; Hibblewhite vs. McMorine, 5 M. & W. 462; Mortimer vs. McCallan, 6 M. & W. 58; Irwin vs. Williar, 110 U. S. 499, and nearly every case heretofore cited.

6. It follows, necessarily, from the foregoing that the failure to identify the particular goods sold does not affect the matter, because, from the very nature of the contract, the sale is not of ascertained articles but of articles of a designated kind and quantity to be selected hereafter, and is discharged by the delivery of articles answering to the general description given in the contract. Sawyer vs. Taggart, 14 Bush. 729.

Applying the foregoing principles to the facts of this case, the defense absolutely fails at every point. The contract assailed imports, upon its face, an absolute obligation on the vendors to deliver, and on the purchasers to receive, the cotton sold. All the evidence concurs in establishing that such were the absolute and actual obligations of the contract.

Not a line of evidence, direct or circumstantial, connects either plaintiffs or their vendees with any agreement, understanding or intention, express or implied, annulling or impairing these obligations.

The circumstances relied on by defendant—that *he* never intended or expected to deliver any cotton; that he had no cotton to deliver, to the knowledge of the plaintiffs, and had no expectation of having any; that no particular bales of cotton were sold, but only so many indefinite bales of a fixed weight and quantity, and others of like character—all prove, under the principles above announced, to be insignificant and of no avail to impair the rights of plaintiffs.

Defendant's objection that plaintiffs did not execute the contract by the actual delivery of cotton, and that he is not bound by the settlement made without his assent, has no force.

Plaintiffs delivered to their vendees what the latter were willing to accept as the equivalent of the cotton, to wit: transferable orders from responsible parties for the same amount and quality of cotton at the same time. They bought and paid for these orders, and they could not have bought and delivered the actual cotton at a less price or with less loss to the defendant. What ground of complaint has defendant? Plaintiff carried his contract to the very eve of its maturity, and only when it was evident that he had no intention of providing them with the means either to execute or settle it, and that they would be compelled, under their own obligations, to settle it themselves, did they make the settlement complained of. It was a substantial execution of the contract, but, had it been otherwise, plaintiffs, left to protect themselves by the unwarrantable default of defendant, might have claimed the right to discharge their obligations in the way most convenient to themselves and to hold defendant responsible for the loss incurred, provided, at least, that loss was not increased by the mode of settlement adopted. The case of Irwin vs. Williar, 110 U. S., 499, needs only to be read in order to show that it contains nothing antagonistic to the foregoing.

The defense in this case is thus fully disposed of.

The course of dealing in futures on the Cotton Exchange, so far as involved here, is not violative of the existing law. On the contrary, the framers of its rules have exhibited the greatest care and skill in conforming them to the law and jurisprudence. If it is attended with evils hostile to the general welfare, remedy must be sought in future legislation. From the publicity and notoriety of the course of these transactions, it must be inferred that the legislative branch of the government has not seen the necessity of interfering with them.

Even had the legality of the contract here been successfully impeached, the defendant would still have had to meet the serious

question whether the plaintiffs, as mere brokers or agents of defendant, might not have recovered, under their contract of agency, their commissions and what they had paid for account of defendant, irrespective of the validity of the contract between the buyer and seller. On this point we express no opinion, only referring to the following authorities for information. Petrie vs. Hannay, 3 Ten., 418; Faihney vs. Raynons, 4 Burr; Planters' Bk. vs. Union Bk., 16 Wall., 500; Knight vs. Cambers, 80 E. C. L., 561; Hacker vs. Hardy, 4 L. R. Q. B., 685; Durant vs. Barthe, 98 Mass., 168; Lehmann vs. Strassburger, 2 Woods, 554.

We desire to acknowledge the assistance afforded us in the examination of these questions, not only by the learned briefs in the case, but by the able *brochure* of Julius Aroni, Esq., of the New Orleans Bar, entitled "Futures."

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed; and it is now ordered, adjudged and decreed that there be judgment in favor of plaintiffs condemning the defendant to pay to them the sum of four thousand two hundred and fifty-two dollars, with legal interest from December 15, 1883, and all costs in both courts.

No. 9441.

MRS. MARY E. FAIREX VS. HENRY BIER.

An appeal by a married woman will not be dismissed, on objection, urged for the first time in this Court, of want of marital authorization, where the record shows that the husband attended the trial of the cause below and signed himself the bond of appeal, with the wife. His active agency in the prosecution of the suit constitutes authorization.

The policy of the law in requiring such authorization is, not only the prevention of ill advised litigation by or against the wife; but also the protection of the adverse party, in order that the judgment to be rendered may bind the wife.

Whenever it appears that the litigation is sanctioned by the husband and however this be shown, the right of the wife to stand in Court for further prosecution or defense, should be recognized.

The transferree, for value, of negotiable securities not due, from the possessor and apparent owner, gets a title which cannot be defeated without proof of actual or constructive notice of the imperfect title of his transferror, amounting to *mala fides*. The fact that such securities have attached to them interest coupons past due, does not destroy the negotiability of the bonds.

APPEAL from the Civil District Court for the Parish of Orleans. *Tissot*, J.

W. S. Benedict for Plaintiff and Appellant.

A. C. Lewis for Defendant and Appellee:

1. An appeal taken from a judgment, where a wife is the plaintiff will be dismissed on motion, if it appears that she was not legally authorized to prosecute the suit in the court below. The authorization of the wife must be given either by the husband or the judge before the trial of the cause *a qua*. 2 Ann. 140; 21st Ann. 576; 22 Ann. 204 and authorities therein cited.
2. An appeal will be dismissed on motion where the transcript is imperfect and incomplete and such imperfection is attributable to the fault of the appellant or her counsel.
3. Where a party sues for *specific property* alleged to be in the *possession* of *another*, the burden of proof is upon such party to show the affimative, and failing to do so, the action must necessarily fall.
4. This being an action for specific property, and there being no prayer or claim in the alternative for the value of the property claimed, there can be no judgment other than one of dismissal or for a thing itself; there can be no monied judgment of the value of the thing.
5. Coupon bonds, of the character of those involved in this case are negotiable by the commercial usage of the civilized world, and possess all the qualities of negotiable commercial paper. Mercer County vs. Hackets, 1 Wall 95; Gelpke vs. Dubuque, Id. Ib. 175; Consolidated Association vs. Avigno, 28 A. 552.
6. *Possession* of negotiable bonds payable to bearer, or endorsed in blank, *carries title* with it to the holder. They pass by delivery. The purchaser is not bound to look beyond the instrument, and a purchaser of them in good faith is unaffected by the want of title in the vendor. The burden of proof on the question of such faith lies on the party who assails the possession. The law is well settled that a party who takes such negotiable paper before due, for a valuable consideration without knowledge of any defect of title, in good faith, can hold it against the world. A *suspicion* that there is a defect of title in the holder, or a knowledge of circumstances that might excite suspicion in the mind of a cautious person, or even *gross negligence* at the time, will not defect the title of the purchaser. Nothing short of actual or constructive notice that the instrument is not the property of the person who offers to sell it—that is, nothing short of *mala fides*—will defeat the right of the purchaser, and this, even where the possession is acquired by *theft*. Hotchkiss vs. Banks, 21 Wall. 384; Murray vs. Lardner, 2 Wall. 110; Goodman vs. Simonds, 20 How. 343; Railway vs. Sprague, 103 U. S. 760; Collins vs. Gilbert, 94 U. S. 754; Shaw vs. Railway Company, 101 U. S. 563; Consolidated Association vs. Avegno, 28 A. 552; Dale vs. Pezotti, 20 A. 264. Overdue and unpaid coupons for interest attached to bonds not matured, do not render the bonds dishonored paper nor affect the negotiability, nor the rights of a purchaser in good faith, without notice. Cromwell vs. Sac County, 95 U. S. 57; Railway vs. Sprague, 103 U. S. 758.

ON MOTION TO DISMISS.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The ground relied on, is that the plaintiff, who is a married woman, has brought this suit and appealed from the judgment dismissing it, without authorization, either from the husband or from the Court.

The objection to this want of authority was not pleaded *in limine*, or before trial on the merits of the case, which were put at issue by an answer. It is urged on appeal, for the first time.

The record shows that the husband of plaintiff was present in court while the trial was progressing, and that he signed the bond of appeal furnished by his wife.

The policy of the law in requiring marital, or when it is refused, or cannot be obtained, judicial authorization in suits by or against married women, is double, not only, for the prevention of ill advised litigation; but also for the protection of the other party to the suit, who has a right to claim that the judgment to be rendered be binding on the wife.

The facts in 22 Ann. 204, are not analagous to those of the present case. The record did not show there as it does here, that the husband had attended the trial.

In a subsequent case, our immediate predecessors, reversing the first judgment therein of the previous court, by which the ruling in 22 Ann., had been made, and somewhat departing from it, held that the signing of the appeal bond by the husband as agent of his wife might not of itself suffice as his authorization, but that his active agency in the suit was proof that it was prosecuted with his approbation and assistance, and constituted authorization. Jones vs. Henry, Manning's Unrep. C. p. 65; O. B. 46, fol. 360.

In a more recent case, the present court held that the signature of the appeal bond by the wife's counsel, as attorney for the husband in the absence of proof of special authority to him, to that end,—was insufficient to justify the deduction of marital authorization to prosecute the appeal. The opinion strongly implies that, had the special power been shown, the appeal would have been sustained. Gibson vs. Hitchcock, 35 Ann. 1201; O. B. 57, fol. 815, N° R.

After a survey of all the authorities bearing on the subject, the rule may fairly be announced to be: Whenever the record shows that the litigation is sanctioned by the husband, and however this appears, the right of the wife to stand in court for further prosecution or defense should be recognized.

In the present instance the denial of marital authorization was not at all urged in the lower court, either before or after the joining of issue. Had it been that plaintiff failed to adduce proper evidence of it, the case would have presented a quite different feature.

The judgment appealed from is not one of dismissal for want of such authority. It is a judgment which passes on the issues presented on the merits of the contention.

Had the judgment been one of dismissal for want of authority and was there not in the record sufficient proof of such sanction, the objection would have presented a grave difficulty.

But it is apparent, not only that the point was not raised below, but also that the husband attended in person the trial of the case before the lower court, and sanctioned the appeal, signing with his wife the bond furnished to perfect it. Clearly then, the litigation is approved by the husband and the judgment to be rendered on the merits will conclude her.

To dismiss the appeal would serve no useful purpose.

Interest reipublicæ ut sit finis litium.

Motion overruled.

ON THE MERITS.

FENNER, J. Plaintiff is one of the heirs of her father, John B. Schiller, who died in 1869, leaving a valuable estate belonging to the community subsisting between himself and his surviving wife. His succession was duly opened and Mrs. Schiller, in 1871, obtained a judgment recognizing her as owner of the undivided half of the property as widow in community and as usufructuary of the other half during her widowhood. Under this judgment of a competent court, she held and dealt with the estate until January, 1881, when this Court rendered a decree annulling and setting aside said judgment and recognizing the right of the heirs to enforce a liquidation and partition of their father's succession.

Amongst the property of Schiller were thirty consolidated bonds of the city of New Orleans for $1000 each, running to maturity.

Plaintiff, in the present suit, averring her ownership, as heir, of one-sixth of said bonds, and alleging that they are in possession of defendant and that he acquired the same in 1878 from Mrs. Schiller, well knowing that they belonged to the succession of J. B. Schiller, and that Mrs. Schiller was without right to dispose of petitioner's interest therein, prays for judgment recognizing her ownership and ordering defendant to restore to her the said bonds to the extent of her said interest.

It might be sufficient answer to the action, in its present form, to say that the evidence shows that the bonds were not in the possession of defendant, but had been disposed of long prior to the institution of this suit.

But, aside from this, the bonds were negotiable and not due, and were passed to Bier upon a valuable consideration by the holder and

apparent owner, and, unless plaintiff can show that Bier was in bad faith and took the bonds with knowledge of his transferror's defective title, she cannot maintain her action. No principle is more firmly imbedded in jurisprudence. Murray vs. Lardner, 2 Wall. 110; Hotchkiss vs. Banks, 21 Id. 354; Collins vs. Gilbert, 94 U. S. 754; Shaw vs. Railroad Co., 101 U. S. 563; Cromwell vs. Sac. Co., 95 U. S. 57; Railway Co. vs. Sprague, 103 U. S. 758.

These cases emphatically hold that nothing less than actual or constructive notice of defective title, amounting to *mala fides*, can defeat the transferee for value.

Plaintiff relies upon two circumstances, as destroying the application of the foregoing principles in this case:

1st. That the bonds, though not themselves matured, had attached to them certain interest coupons which were past due and not paid, which, it is claimed, should operate constructive notice and destroy their negotiability. The proposition has no force in reason and has been pointedly ruled in an adverse sense very recently. Railway Co. vs. Sprague, 103 U. S. 756.

2d. It was charged that defendant knew that Mrs. Schiller held these bonds in her capacity as representative of the succession of Schiller. We have closely studied the evidence and it convinces us, as it did the judge *a quo*, that no such knowledge is brought home to him.

The case of Stern Bros. vs. Bank, 34 Ann. 1119, and those cited from 31 Ann. 215, 32 Ann. 1250, 21 Wall. 143, 96 U. S. 193, 97 U. S. 371, and 99 U. S. 434, relied on by plaintiff, have received our careful attention, but we find them inapplicable to this case.

Judgment affirmed.

No. 9503.

THE STATE EX REL. A. J. STERKEN VS. JUDGE CIVIL DISTRICT COURT, DIVISION A, ET AL.

A suspensive appeal does not lie from an interlocutory decree dissolving an injunction on bond, unless it appears that the act prohibited would work an irreparable injury to the plaintiff.

When the plaintiff in injunction has failed to allege any personal injury to flow from the act complained of, it is safe to conclude that he could not suffer irreparable injury from the interlocutory order dissolving his injunction on bond

A district judge who allows an injunction to be dissolved on bond, because the act complained of would not work irreparable injury to the plaintiff, should consistently refuse a suspensive appeal from his dissolving order, as the latter only applies when the interlocutory decree would cause irreparable injury.

State ex rel Sterken vs Judge.

APPLICATION for Mandamus and Prohibition.

F. Michnard for the Relator.

W. H. Rogers for the Respondents.

The opinion of the Court was delivered by

POCHÉ, J. The relator complains of the refusal of the respondent judge to grant him a suspensive appeal from an order dissolving on bond a writ of injunction previously obtained by him.

The proceedings in which the injunction had issued are brought up by the relator, and they show that on his petition, charging that the defendant in that suit, "The Louisiana Excavating and Manufacturing Company," was using, contrary to law, certain wharves in the city of New Orleans, in the pursuit of its business, an injunction had been issued forbidding the defendant company from performing the acts complained of by the plaintiff in that suit, who is the relator in the present proceedings.

His petition for injunction contained no allegation or intimation of the nature or extent of the damages which he could suffer in consequence of the illegal acts therein charged against the defendant company; and in fact it contained no averment of any personal injury which relator could have suffered from the acts complained of, and which he sought to enjoin.

His right to a suspensive appeal from the interlocutory order dissolving his injunction on bond, depends upon the alleged irreparable injury which could result to him from the decree in question, and it thus appears that his failure to allege any personal damage at all in his petition for injunction, strips his present allegation of irreparable injury of all force and of all weight whatever.

The rule, as established by numerous decisions of this Court, is that no appeal will lie from an interlocutory order dissolving an injunction on bond, unless it appears from the pleadings that the performance of the acts complained of would work irreparable injury to the plaintiff in injunction. Wm. T. Levine et al. vs. Mitchell, 34 Ann. 1181, and authorities therein cited. It therefore stands to reason that the rule will apply with immeasurable force, in a case where the plaintiff in injunction had utterly failed to allege any personal injury in consequence of the act which he sought to prohibit.

In this, and in all similar cases, in which the judge's order dissolving the injunction on bond, is predicated and rests on the legal belief and

conclusion that the act prohibited would not work irreparable injury, it would be inconsistent in him to allow a suspensive appeal, the legality of which depends upon a condition of things entirely to the reverse.

The judge's course in the instant case, in refusing a suspensive appeal, is consistent with his motives in allowing the dissolving order; it is amply supported by the pleadings, hence it must be maintained.

It is therefore ordered that the writs of mandamus and prohibition herein prayed for, be denied at the costs of relator.

No. 9492.

THE STATE EX REL. JOSEPH NOTAL VS. R. C. DAVEY, JUDGE OF FIRST RECORDER'S COURT.

Where a party is tried for violating a city ordinance relating to private market, and in his defense charges that the ordinance is unconstitutional and illegal, he has the right to appeal from a sentence against him; and after the appeal, if suspensive, is perfected by the execution of the required bond, the recorder imposing the sentence is deprived of all jurisdiction over it and can be prevented from executing by a writ of prohibition.

APPLICATION for Prohibition.

Belden & Ambruster for the Relator.

W. H. Rogers, City Attorney, for the Respondent.

ON APPLICATION FOR PROHIBITION.

The opinion of the Court was delivered by

TODD, J. The relator represents that he was tried before the respondent for keeping a private market in violation of City Ordinance No. 4798, A. S., and was found guilty and sentenced to pay a fine of twenty-five dollars, and in default of payment to be imprisoned thirty days.

That he applied for and obtained a suspensive appeal from said sentence to this Court, and perfected the appeal by executing the required bond; that notwithstanding said appeal, the said recorder (respondent) is arbitrarily attempting to execute said sentence by the forcible collection of said fine or by his (relator's) imprisonment; and he asks for a writ of prohibition to restrain the recorder from further proceedings in the premises.

An alternative writ was granted and the recorder required to show cause why the same should not be perpetuated.

The recorder has answered, but does not in his answer deny the facts alleged in the relator's petition touching the trial, sentence and appeal, as set forth. He merely alleges that in his opinion the relator was properly convicted, and that his defense to the charge against him—which was, in substance, that the ordinance under which he was prosecuted was unconstitutional—was not a valid defense: and that said ordinance, in a similar proceeding, had been pronounced by this Court constitutional and legal.

This answer does not justify the action of the recorder complained of. Though the sentence in question may, in his opinion, have been entirely correct, yet the relator, from the character of his defense, had the right to appeal therefrom. This right was conceded by the recorder who granted the appeal; and the appeal when perfected, as stated, suspended the execution of the sentence and deprived the recorder of all jurisdiction over the matter. His attempt therefore, notwithstanding the appeal, to execute the sentence appealed from, by coercing the payment of the fine or the imprisonment of the relator, was wholly unwarranted. It may be that upon the trial of the appeal the sentence complained of may be found correct and affirmed by this Court, but this has nothing to do with the issue now before the Court. Whether the sentence be right or wrong, so soon as the appeal therefrom was taken and consummated, the recorder lost all jurisdiction and control over it.

The prohibition asked for is therefore made peremptory.

No. 9218.

THE STATE OF LOUISIANA VS. GEORGE WASHINGTON, *alias* GEORGE BARTLEY.

A prisoner who, for want of a safe jail in the parish, is confined in the jail of an adjoining parish, remains in the legal custody of the sheriff and subject to the jurisdiction of the court of the parish where he is under prosecution, and service on him of notice of trial and list of jurors by sheriff of the latter parish, though made at the jail in another parish, is a sufficient compliance with R. S. Sec. 992.

When after three jurors are empanelled, accused for the first time objects that the list had not been called in regular order, and when, thereafter, the names are so called as required, no ground of complaint exists.

After trial begun and jury partially empanelled accused cannot obstruct progress of trial by requiring attachments for absent jurors.

State vs. Washington.

APPEAL from the Twenty-sixth District Court, Parish of Jefferson. *Hahn*, J.

M. J. Cunningham, Attorney General, *G. Lèche*, District Attorney, and *A. E. Billings*, for the State, Appellee.

A. Sambola for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. The first bill of exceptions is to the refusal of a continuance applied for on two grounds, viz:

1st. That notice of trial and list of jurors were not legally served upon him nor in due time. It is admitted that they were delivered to him more than "two entire days before the trial," which, as to *time*, is a full compliance with the requirement of Sec. 992, R. S. As to the *mode* of service, it appears that, owing to the absence of a safe jail in the parish of Jefferson, the prisoner was confined in the jail in New Orleans, and the service was made there by the sheriff of Jefferson. Although confined in New Orleans, he was still in the legal custody of the sheriff of Jefferson and subject to the jurisdiction of the Jefferson court, and we think the service was properly made. The statute simply requires that the list and notice should be "*delivered*" to the prisoner, and while it no doubt contemplates an *official* delivery, we think the requirement was fully complied with here. Besides, even had the service been irregular, there is no showing of injury, and, as his counsel resided in New Orleans, the presence of the prisoner there increased his convenience for consultation.

2nd. Because the defendant was deprived of the service of the counsel of his choice, who was unable to defend him by reason of the fact that he was district attorney of an adjoining district. The ground is frivolous, since it invoked a continuace until a certain attorney should cease to be a district attorney, and thus be in a position to become his counsel, which he was not at the date of trial.

The second exception complains that the jurors were not called in the order in which their names appeared on the jury list. The judge explains that the jury-list had been previously called, and certain jurors being found absent or excused their names were omitted in the calling in this case; that accused did not object to this until three jurors had been empanelled, and that, after his objection, the calling was made according to his wish. Certainly no error is apparent in this.

The third and fourth bills are leveled at the action of the judge in calling talesmen after exhaustion of the regular jurors present and in refusing to issue attachments for the absent jurors. The application for attachments was not made until after three jurors had been empanelled, and the action of the judge is fully sustained by repeated decisions of this court. State vs. Saunders, 37 Ann. 389; State vs. Farrer, 35 id., 316.

Judgment affirmed.

No. 9489.

THE STATE EX REL. H. E. UPTON VS. H. L. LAZARUS, JUDGE, ETC.

A *mandamus* lies to compel the granting of a suspensive appeal from a judgment directing the sale of succession property exceeding two thousand dollars in value.

The capacity of one representing himself as attorney for absent heirs, and whom the *mortuaria* shows to have been appointed and to have acted as such, and who was expressly recognized by the judgment from which he seeks to appeal, cannot be successfully contested by the district judge, on the application for the mandamus.

APPLICATION for Mandamus and Prohibition.

H. E. Upton, propria persona.

Respondent Judge, *propria persona.*

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an application for a *mandamus* to compel the granting of a suspensive appeal.

The relator claims to be the attorney, appointed by the court, to represent the absent heirs of one Fischer.

He avers that an application having been made for the sale of all the succession property, he opposed it, as unnecessary; but that, his opposition having been discharged and the sale ordered, he applied for a suspensive appeal, tendering a proper bond; that the same was refused him.

He therefore invokes the intervention of this Court to secure such appeal.

The district judge returns, denying that the relator is the attorney for the absent heirs of Fischer, and justifying the correctness of the judgment discharging the oppositions and decreeing the sale.

The record of the *mortuaria* shows that the relator was appointed attorney for absent heirs on the 17th of April, 1884, and that the opposition to the sale prayed for by the Public Administrator was filed by

him, in that capacity. The entry on the minutes and the judgment show that he officiated as such attorney at the trial of the opposition, and that, in as many words, the court ordered that the opposition filed by him, *naming him*, be discharged.

But the district judge says, that on the 22d of March, 1878, another attorney had been appointed to the absent heirs, and that on the 17th of April, 1884, when the relator was appointed, the first order of appointment had not been cancelled.

The relator was appointed on the petition of the widow of the deceased, averring a state of facts and concluding with a prayer for the appointment of an attorney for absent heirs.

It may well be that the district judge thought that, under the circumstances stated, another attorney should be appointed in place of the former one, and that he acted accordingly.

The last appointment impliedly revoked the previous one, as there could be appointed only one attorny to the absent heirs of the deceased.

The district judge is presumed to have then done his duty.

He subsequently, at the trial of the opposition to the sale, recognized and treated the relator as attorney for absent heirs. It is difficult to perceive how he can presently dispute that capacity.

It is immaterial, under the actual phase of the controversey, to determine whether the district judge decided or not correctly. That question will come up on the appeal to dissolve.

The only question to be solved is, whether the order of sale which he made and which has the form and substance of a final judgment, contradictorily rendered and signed, is or not appealable.

This judgment belongs to the class of those, the execution of which can cause irreparable injury. It orders the sale of property exceeding in value two thousand dollars, and is supensively appealable. State ex rel. Fassman, 22 Ann. 200; Const., art. 81; 36 Ann. 887.

It is therefore ordered that the alternative *mandamus* herein issued be made peremptory and the restraining order perpetuated.

No. 9447.

MARIE L. LUTENBACHER VS. SIMON LOSCHER.

This being an action for nullity of a marriage on the ground of a subsisting prior marriage of one of the parties, and the evidence sustaining the charge being held sufficient, judgment is rendered for plaintiff.

Lutenbacher vs. Loscher

APPEAL from the Civil District Court for the Parish of Orleans. *Tissot*, J.

Marks & Bruenn for Plaintiff and Appellant:

1st. Where the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true unless disproved by that party. 1 Greenleaf, Sec. 79; 31 Ann., 691; 13 Ann., 397; 10 Ann., 639; 1 Bishop, Marriage and Divorce, Secs. 435, 436.

2d. Every intendment of law is in favor of matrimony, thereby casting the burden of proof upon the party objecting, requiring him to rebut the presumption. *Semper præsumitur pro matrimonio*. 1 Bishop, Marriage and Divorce, Sec. 457.

3d. A presumtion, precise, weighty and consistent adduces, naturally, the unknown fact from the known fact. Such presumption is not susceptible of application to other circumstances than those which it is sought to establish. C. C., 2288; 3 Ann. 103.

4th. A certified copy of marriage contract, duly authenticated, is admissible in evidence as of the *res gestæ*. 15 Ann. 313; 1 Bishop, Marriage and Divorce, Sec. 471.

5th. Marriage is a civil contract, and as such may be proven by any evidence, not legally prohibited, where no higher species is presupposed as within the knowledge or under the control of the party averring. C. C., Art. 86; 6 Louisiana, 470; 5 Ann. 480; 30 Ann. 1388.

6th. Names of husband and wife, date of marriage and certificate, duly authenticated, is *prima facie* evidence of identity of parties thereto, sufficient to put contestants to proof of contrary. 7 Ann. 252. Such identity may also be established by circumstantial evidence. 1 Bishop, Marriage and Divorce, Sec. 479.

7th. The deliberate admission or confession of the fact of such marriage transpiring either in this or in a foreign country is competent evidence, and will be considered. 1 Bishop, Marriage and Divorce, Sec. 497, and authorities cited; 1 Greenleaf, Sec. 195; 2 Greenleaf, Sec. 461, note and authorities there cited.

L. Brickerson and *J. Duvigneaud* for Defendant and Appellee.

The opinion of the Court was delivered by

FENNER, J. This is an action for a decree of nullity of a marriage between plaintiff and defendant on the ground of a subsisting prior marriage of the latter. The evidence is to the following effect:

The parties to this suit were married in this city in January, 1884. In March following a letter addressed to defendant was received and opened by plaintiff, which came from France, was signed Virginia Loscher, and in which the signer addressed him as her husband. Upon being taxed with this he denied the former marriage, took away the letter and burned it. Subsequently, on further inquiry instituted in France, a cablegram was received confirming his former marriage. At this moment he was in prison upon some criminal charge. On receipt of the cablegram the brother-in-law of plaintiff visited him in prison, and he then fully confessed his crime and asked the visitor to do him the last favor of procuring him some poison in order that he might end a ruined life.

On the trial duly authenticated certificates of both marriages were produced, in each of which he was described as born in Austria and as being the legitimate son of Ignace Loscher and Anna Guggenbichler.

The priest who celebrated the marriage here testified that the above particulars of his nativity and parentage were obtained from defendant himself, who at first objected to giving them, and only did so upon the priest's insisting that it was necessary.

There was also produced the official certificate of the mayor of Besançon, France, duly authenticated, attesting that the first wife was still living.

Against this strong array of evidence the defendant, who was present at the trial, offered no opposing testimony.

The judge *a quo* rendered a judgment of non-suit.

The respect which we entertain for his opinion causes us to regret the absence from the record of any statement of the grounds on which he based his judgment, and the failure of defendant to furnish us with any oral or written argument leaves us in darkness on the subject.

The intrinsic force of the evidence above set forth, strengthened by the powerful presumption resulting from the failure of defendant to offer any countervailing testimony, negativing or explaining the facts adduced, certainly suffices to establish, beyond reasonable doubt, the truth of plaintiff's allegations. In absence of any suggestion of connivance, which, indeed, could hardly exist in such a case, and is moreover conclusively rebutted by the record, we are convinced that plaintiff is justly entitled to the relief for which she prays.

It is therefore ordered, adjudged and decreed that the judgment appealed from be avoided and reversed; and it is now ordered and decreed that there be judgment in favor of plaintiff and against defendant, decreeing the nullity of the marriage entered into between said parties in the city of New Orleans on January 12th, 1884, and the release of plaintiff from all legal obligations arising thereunder, defendant to pay costs in both courts.

No. 9481.

SUCCESSION OF LOUISA DORRIES.

A nuncupative will by public act which does not contain express mention that it was *written* by the notary, is a nullity. The omission to so declare is fatal, as it cannot be supplied by testimony *aliunde*.

The law imperiously exacts not only that the prescribed formalities be observed, but also that an explicit recital be made that they have been fulfilled; and this under pain of nullity of the act

Succession of Dorries.

APPEAL from the Civil District Court for the Parish of Orleans. *Tissot*, J.

J. R. Beckwith and *H. E. Upton* for Appellant:

If an examination of the whole will will show that it was read to the testator in the presence ence of the witnesses, it is immaterial in what words the idea is conveyed. 1 N. S. 73; 3 N. S. 368.

It suffices if, from the whole instrument, it can be inferred that the witnesses were present. 26 Ann. 338; 12 Ann. 604.

When the will states that "the testatrix declared and dictated it to the notary, and that it was made and signed by her and the witnesses after it was read," it may be fairly inferred that the witnesses and notary were all present during the dictation and execution. Pizerot et al. vs. Meiullon's Heirs, 3 M. 114.

Braughn, Buck, Dinkelspiel & Hart for Appellees:

It is a fatal objection to a will offered as an authentic nuncupative one, that no mention is made of its having been written by the notary. 6 New Series. 263

The opinion of the Court was delivered by

BERMUDEZ, C. J. The will of the deceased, which is in the nuncupative form by public act, is attacked on various grounds, one of which is that it does not contain the formal declaration that it was *written* by the notary.

We have carefully scanned the instrument and weighed each and every word used in the *procés verbal* of the notary, whether in the caption or in the closing part, and have failed to find any from which it can be even inferred that the will was *written* by that officer.

The law, in mandatory terms, imperiously requires that express mention be made, not only that the will was dictated by the testator and read to him, but also that it was *written* by the notary; and this under pain of nullity.

The omission to recite explicitly strict compliance with the requirements of the law is fatal, as it cannot be supplied by testimony *aliunde*. R. C. C. 1578, 1595; see 3 M. 167; 6 N. S. 263; 12 L. 114; 8 A. 469; 15 L. 28; 1 R. 48; 11 Ann. 108; 16 L. 82; 20 Ann. 203; 21 Ann. 115; 35 Ann, 480.

In the Lawson case, 12 Ann. 604, in which the will had been attacked because it did not set forth that it had been *written* by the notary, in the presence of the witnesses, the instrument contained express mention that the notary had *written it in his own proper hand.* What the Court held is: that it was fairly deducible from the tenor of the instrument that the witnesses were present while it was being prepared.

The other authorities referred to do not apply to a case of writing by the notary.

In the present case, the word *written*, or its equivalent, is essentially lacking.

The will is a nullity.

Judgment affirmed.

No. 9413.

Félicien Landèche vs. Delord Sarpy.

The contract involved is interpreted and held to be a valid reciprocal contract, by which the plaintiff was bound to furnish, and defendant receive and pay for, hogsheads and barrels, as required under the terms of the contract, at the prices fixed; and also that defendant was bound to pay for the articles as delivered. Campbell vs. Lambert, 36 Ann. 35, commented upon.

Plaintiff having delivered certain barrels and hogsheads, which had not been paid for though the bill had been presented at defendant's office, and having informed defendant's agent that he would furnish no more because his bill had not been paid, and no offer to pay having been afterwards made, was not in default during the term of his contract.

The breach of contract complained of being one of nonfeasance, and there being no legal excuse for omission to put in default, defendant's reconventional demand for damages is rejected.

APPEAL from the Civil District Court for the Parish of Orleans. *Houston*, J.

James Legendre and *St. M. Bérault* for Plaintiff and Appellant.
Henry Denis for Defendant and Appellee.

The opinion of the Court was delivered by

Fenner, J. Plaintiff sued the defendant for $539.30 value of certain hogsheads and barrels furnished the latter for the use of his Glendale and St. George plantations.

Defendant answered by a general denial as to plaintiff's demand, and then, assuming the character of plaintiff in reconvention, alleged substantially that plaintiff had contracted to furnish him all the hogsheads and barrels necessary for the sugar and molasses which he would make during the crop-year of 1882 on his Glendale and St. George plantations, on the same terms and prices on which he had furnished them for the preceeding year, viz: at $2.60 per hogshead and $1.25 per barrel, and to deliver the same as required; that plaintiff partially complied with his contract by furnishing some hogsheads and barrels during the months of November and December, but subsequently refused to furnish any more, notwithstanding repeated demands; that defendant was, therefore, compelled to purchase at higher prices, occasioning him a direct loss of $1,724.35 in difference of price, besides other damage, aggregating in all $2,419.07, resulting from plaintiff's inexecution of his contract; and he prayed for judgment dismissing plaintiff's demand and awarding defendant the sum claimed as above.

There was judgment below in favor of plaintiff for the amount of the principal demand, and in favor of defendant for $1,724.35 on his reconventional demand.

I.

Plaintiff and appellee suggests absence of jurisdiction in this Court on the ground that the amount in dispute is only $1,879.77, being the *difference* between the principal and reconventional demands. The question is to be determined on the face of the pleadings, and from the review of these which we have given above, it fully appears that there is no admission of any amount due to plaintiff, but, on the contrary, a denial and prayer for its rejection. Hence, the authorities quoted (35 Ann. 346; 33 Ann. 1089; 26 Ann. 291,) even if otherwise applicable, do not reach this case. The suggestion has no merit.

II.

Plaintiff contended that the contract alleged and proved was a simple promise to furnish the hogsheads and barrels at the price stated on the demand of defendant, without any reciprocal obligation on the part of the latter to take and pay for them, and was, therefore, void for want of a cause or consideration, under the doctrine of Campbell vs. Lambert, 36 Ann. 35.

After a close study of the evidence we conclude that the contract, sufficiently alleged and proved, was reciprocal, equally binding the plaintiff to furnish, and the defendant to take and pay for, the articles; at the prices fixed. That this was plaintiff's understanding of the contract is sufficiently apparent from his letter, in which he thanks Mr. Sarpy for having agreed to "continue to take hogsheads and barrels from him." It follows that Campbell vs. Lambert has no application; but, so far as this question is concerned, it falls under the authority of Beck vs. Fleitas, 37 Ann; in which a similar contract was upheld.

The decision in Campbell vs. Lambert was so freely criticized in the argument here as violative of the principles of the civil law, that we feel compelled to notice it. The authority of Pothier was firmly relied on as establishing the contention. This exhibits a misapprehension of the question involved. It is conceded that a promise to sell without a reciprocal promise to buy might be valid under the civil law; but the question is whether Art. 2462 of our Code and 1589 of the French Code has not changed the prior law in this respect, upon which question, of course, Pothier is of no authority. The French commentators and courts are divided on the question, several holding that such an unilateral promise is no longer binding. Journal de Palais, 29th Aug. 1829: Journal de Palais, 28th June, 1832; Merlin Rep. vo. Vente, § 7, No. 5; Favard vo. Vente, sec. 1, § 4; Rolland & Villargues vo. Prom. de Vente. On the other hand, Troplong, Marcadé and others of high

authority maintain that the Code has not altered the ancient law on this point.

In such a conflict we would feel at entire liberty to follow either solution according to our own judgment. But we have not yet had occasion to make the choice. We have not held in Campbell vs. Lambert that *no* unilateral promise to buy or sell is valid; but simply that *such* a one as was there exhibited is not. While the ancient civil law and many commentators on the French Code have maintained the validity of an unilateral promise to sell at a fixed price, within a given delay, a house, a farm, a horse or other particular thing, we venture to say that no system of law or respectable author has ever extended the principle to such a promise as that exhibited in Campbell vs. Lambert, which concerned merely a given quantity of a merchantable article fluctuating daily in price, and the effect of which was to enable the promisee to enforce the sale if the market went in his favor and to abstain if it went against him. In point of fact, in Campbell's case, the promisee claimed a profit of $29,000, on an executory contract under which he ran no possible risk of loss. In comparison with a system of law sustaining such a contract, the ethics of the gambler's code would have been respectable; for that prohibits betting on a certainty.

IV.

A pivotal question under the facts of this case, is what were the terms of the contract as to the payment for the articles furnished.

It is admitted that the contract was similar to that for preceding year. Landèche says positively that "the terms of the agreement were that he would pay me for the goods on and at each delivery thereof." Sarpy testifies that there was no agreement as to the time of payment. He admits, however, that the mode of execution had been to pay on delivery, saying, "when he used to send barrels he would bring the bill in and I would pay him."

In the absence of express agreement for delay of payment, we know of no principle under which defendant could claim the right to terms of credit for goods delivered; and, in view of the conflict of evidence and of the interpretation placed on the contract by the mode of execution pursued between the parties, we are compelled to conclude that plaintiff had the right to demand, and defendant was bound to make, payment for the goods as delivered.

V.

Between November 17th and December 7th, 1882, Landèche had delivered goods to the value of $539.30, the price of which was due.

Mr. Sarpy was his own merchant, selling his own crops, and kept an office in New Orleans where he transacted his business. He says himself he kept it "as the place where he was to be found to pay his bills." We assume, and it is nowhere denied, that it was the proper place for Landèche to present his bill for payment. He sent it to his merchant in New Orleans for presentation and collection. It was returned to him with the information that it had been presented at Mr. Sarpy's office, and that "Mr. Sarpy being always ill, his son had answered that he could not pay your account."

The clerk who presented the bill testifies as follows: "The son said to me that his father was sick, and that during his absence from the office he, the son, could not pay the bill. I asked him when the bill could be paid, and he told me that he did not know."

Mr. Sarpy himself admits that the fact of this demand was communicated to him.

Shortly after this, Agaisse, an assistant overseer of Sarpy, on Glendale plantation, and an agent in reference to this business, called upon Landèche to get headings for hogsheads furnished under the contract, when he was informed by Landèche that "if I was coming for hogsheads and barrels I could go back, for he would not furnish Mr. Sarpy any more hogsheads and barrels, because he had had his bill presented to Mr. Sarpy and he had refused to pay it."

This is proved by the testimony of Agaisse himself and four other witnesses; and Agaisse further states: "I then told him it was all right, and I would inform Mr. Sarpy of the fact."

It seems that Agaisse never did convey this information to Sarpy, since the latter declares that he never knew that Landèche assigned such a reason for his refusal; but that is the fault of the agent, not imputable to Landèche; and under the doctrine that knowledge of the agent is knowledge of the principal, Sarpy is, in the eye of the law, affected with such knowledge.

He never, thereafter or at any time, paid or offered to pay the past due bill, which, under the view we take of the contract, was a condition precedent to his right to require Landèche to proceed under it.

The vague testimony that in reply to subsequent demands, Landèche assigned different reasons, sending messages sometimes, "that he did not have the barrels and hogsheads, and sometimes that he would see me," does not affect the case.

The first reason already assigned was sufficient and placed Landèche in his right.

We conclude that during the entire term of his contract, Landèche was never in default, and that defendant's reconventional demand was wrongfully sustained by the lower court.

This is a case of nonfeasance, not of defective execution, and, therefore, Berje's case, as appears from the last opinion therein, is inapplicable. 37 Ann. 471.

In cases of nonfeasance, or failure to perform an executory contract, putting in default or some valid excuse for omitting it, is essential to the recovery of damages. C. C. 1912-3-4.

We have admitted various excuses for the omission, such as the one recently accepted in Beck vs. Fleitas, where the party had denied the existence of the contract, and we held that putting in default would have been useless.

But here, in order to put Landèche legally in default, it was necessary, under C. C. 1913, that Sarpy should "offer or perform, as the contract requires, that which, on his part, was to be performed," viz: to pay for the articles already delivered. *Non constat* that, if he had made such offer and demand, Landèche would not have complied with his contract.

We have considered the suggestion that, in view of Mr. Sarpy's admitted means, the excuse of Landèche was a mere pretext to escape from a bad bargain. Very likely he availed himself of the excuse because it was his interest to do so; but, if the law secures to him the right of requiring default before being held for damages, we cannot deprive him of it, because his motive in exercising the right may have been questionable.

It is therefore ordered, adjudged and decreed that the judgment on the reconventional demand herein appealed from be and is hereby annulled, avoided and reversed, and it is now decreed that said demand be dismissed at reconvenor's costs in both courts.

Rehearing refused.

No. 9449.

SUCCESSION OF JULIA F. HOSSER, WIFE OF THEODORE LILIENTHAL.—

ON PETITION OF LOUIS LILIENTHAL.

An act of adoption, executed in the manner prescribed by law, confers on the adopted child against the adoptors all the rights of a legitimate child, *provided* they do not interfere with those of forced heirs.

Rights thus conferred can no more be divested by a will than can be those of a legitimate child, born of the adopting person.

The disposition which a married woman, who leaves no forced heir, makes under such circumstances, in favor of her husband, of the bulk of her estate, is reducible to the disposable portion.

Succession of Hosser.

APPEAL from the Civil District Court for the Parish of Orleans. *Monroe*, J.

Farrar & Kruttschnitt for Appellant.

Braughn, Buck & Dinkelspiel and *A. Bernau* for Appellee.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an action for the nullity of the will of the deceased, so far as the disposition which it contains may affect the inheritance to which the plaintiff claims to be entitled, as the forced heir at law of the testatrix.

From a judgment making the reduction, this appeal is taken.

Louis Lilienthal was formally adopted by Mr. and Mrs. Theo. Lilienthal, as their son, on their petition to a district court and the authority of that court referring them to a notary for the execution of the act of adoption; the proceeding having been carried on contradictorily with a tutor *ad hoc*.

Mrs. Lilienthal subsequently made her last will, instituting her husband her universal heir and legatee.

She afterwards died, leaving no forced heir. Her succession was opened by her husband, who was *ex parte* recognized and put in possession.

The laws enacted relative to adoption are, Acts No. 48 of 1865; 17 of 1867; 64 of 1878 and 31 of 1872. See also R. S. 2322-8.

The sole provisions on that subject, found in the "Revised Civil Code," are contained in Art. 214.

The statutes and the code regulate the forms to be followed and announce the rights acquired, in such cases.

The first of the acts had for its object, to permit adoption, which previously was prohibited in this State.

It provides for the judicial proceeding to be had, the judicial authority to be obtained and the notarial instrument to be executed, in furtherance of it.

It decides however, that the adoption, authorized by it, shall, in no manner, interfere with the rights of forced heirs.

Article 214 of the R. C. C. provides: that the person adopted shall have all the rights of a legitimate child, in the estate of the person adopting, except that such adoption shall not impair the rights of forced heirs.

In 1858, when adoption was prohibited and allowed only by special legislation, the then Supreme Court was called upon to determine what the rights were of an adopted child. 13 Ann. 516.

The pretensions of the claimant rested on an act of the Legislature of 1837, which enacted, that the husband and the wife (naming them) "be authorized to adopt a young orphan child named Adele, aged about seven years, who had been brought up by them, *provided* the adoption be executed by act signed before a notary public in said Parish of Orleans, within six months, after the passage of this law."

The contest was between the adopted child and the collateral heirs (nephews and nieces,) the wife having died, leaving no forced heir.

The act was silent as to rights conferred or restrictions placed.

In an elaborate and learned opinion, the Court held, through its organ, C. J. Merrick, that the act in question had to be interpreted as conferring on the adopted child, all the rights of a legitimate child and as entitling him to inherit the estate, to the exclusion of the collateral heirs. Vidal vs. Commagere, 13 Ann. 516.

It is true in the case thus decided, the deceased had left no will; while in the present instance, she has.

This circumstance is of no moment.

The act of adoption conferred on the adopted child, all the rights constituting the relation of parent and child and all the consequences flowing from that relationship, as against the *adoptors;* with this restriction, that the adoption was not to interfere with the rights of their forced heirs, that is: of the *ligitime* of such heirs.

Such must have been the understanding of the law by the parties, for, in the act of adoption, they expressly declare that they do adopt Louis Mitchler and invest him with all the rights and privileges appertaining to legitimate children, and for all intents and purposes, consider him as if he was actually and in fact their legitimate son,—it being understood that the adoption shall not affect the right of forced heirs, if any.

The rights conferred were those of a legitimate child, that is: rights to inherit both *without*, and *notwithstanding* a will.

It therefore follows that the attempt to divest such rights must necessarily prove of no effect beyond the disposable portion.

As Mrs. Lilienthal left no forced heir, the adoption could not and did not clash with the rights of any forced heir, and the adopted child was called to inherit from her, as though he were a legitimate child, born of her body; otherwise he would have had to take from the disposable portion.

This conferring of rights was as complete and potent, as that which the law would have made, had the plaintiff been born from the testatrix and could no more be divested than the latter, by testamentary disposition. The adoption produced that effect, or it was an idle and barren ceremony.

The district court decided correctly.

Judgment affirmed.

Rehearing refused.

No. 9511.

THE STATE EX REL. GEO. NICHOLSON AND WIFE ET AL. VS. THE JUDGE OF THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, DIVISION A.

In an application for mandamus to compel an inferior judge to grant a preliminary injunction which he has refused, the mere allegation of error in the ruling, unaccompanied by any charge of arbitrary or oppressive conduct, denial of justice, refusal to perform any duty, or by any showing of absence or inadequacy of other means of relief, will not support the remedy sought. The writ of mandamus is an extraordinary remedy, only allowed under the exceptional circumstances set forth in the law, the existence of which must be sufficiently set forth in the petition.

APPLICATION for Mandamus.

Thos. J. Semmes and *Robt. Mott* for the Relators.

Respondent judge *propria persona.*

The opinion of the Court was delivered by

FENNER, J. This is an application for the exercise of our supervisory jurisdiction by making peremptory a writ of *mandamus* commanding the inferior judge to grant a preliminary injunction, which, upon due consideration and for reasons given, he has refused.

The petition for the mandamus is barren of any allegations supporting the relief asked. It does not charge the respondent judge with any arbitrary, oppressive or illegal conduct, or with failure or refusal to perform any duty of his office, nor does it set forth the absence or inadequacy of other means of relief. The sole qualification of the conduct of the judge is contained in the phrase: "The court refused the injunction on authorities which your relators believe are not obligatory and have no application"—and no other ground for our interference is assigned.

We are merely asked to correct an alleged error in the ruling of the judge, and no showing is made justifying the substitution of the extra-

ordinary remedy by mandamus for the ordinary relief by appeal which the law affords.

The articles of the Code of Practice touching the writ of mandamus and our decision in the case of State *ex rel.* Murray vs. Judge, 36 Ann. 578, sufficiently indicate the exceptional circumstances under which alone this relief is granted and the necessity of alleging their existence as a prerequisite to the remedy.

We have no occasion, therefore, to proceed to the consideration of the correctness *vel non* of the judge's ruling; but see N. O. vs. Tel. Co., 37 Ann. 571.

It is, therefore, ordered that the restraining order herein issued be rescinded and that the application for *mandamus* be refused at cost of relators.

Rehearing refused.

No. 9499.

THE STATE EX REL. MARGARET MATT AND HUSBAND VS. N. H. RIGHTOR, JUDGE.

The statute requires that proceedings by a landlord against his tenant for the recovery of possession of leased property shall be summary, and this applies equally to such proceedings in the appellate as in the court of the first instance.

Where an exception had been filed in the City court and had been maintained, and on appeal the District court had reversed that ruling, it was the duty of the latter court upon such reversal to proceed to hear and determine the merits.

Such appeals are triable by the District courts in vacation or the summer recess as like cases are triable by those courts in vacation when originating in them.

Pleadings are taken for what they really are and not for what their authors designate them.

APPLICATION for Prohibition.

A. Bernau for the Relators.

Braughn, Buck, Dinkelspiel & Hart for the Respondent.

The opinion of the Court was delivered by

MANNING, J. George Boning brought suit in the City Court against his lessees and tenants Margaret Matt and husband to recover possession of the leased premises, and they excepted alleging illegality of the notice and of citation and informality of the proceedings. Their exception was maintained and a judgment of dismissal, as of non-suit was entered, from which Boning appealed to the District

Court. The case was allotted to Judge Tissot, but he being absent during the summer vacation and having designated Judge Rightor to act in his stead, it was tried by the latter judge, who overruled the exception, heard the merits and gave Boning judgment for possession. Whereupon the tenants obtained writs of certiorari and prohibition from this court to the end that the regularity and legality of the proceedings below shall be examined, the case not being appealable. The monthly rent was sixty dollars and the suit was filed and decided in August last.

When the case reached the District court the landlord moved that it be fixed after three days notice, which was done, the tenants objecting to a summary trial and to a trial in vacation at all, on the ground that such trial could be had only of cases originating in the District court.

The objection was properly overruled. The statute specifically requires that these proceedings of a landlord against his tenant shall be summary, Rev. Stats. secs. 2155-6, and this prime object of the law would be defeated if the trial on appeal should not be equally rapid as in the court of the first instance. The 3d Rule of the Civil District Court includes suits of a landlord for the possession of leased property among those triable in the summer vacation, and must be construed with the 32d Rule that provides for the trial of appeals from the City courts so that nothing contained in either shall interfere with the statute above cited or retard the hearing of suits of this kind.

Another objection was that no trial could be had upon the merits—that as the judgment of the City court was on an exception the District court could do no more than say whether it was right or wrong, and if wrong remand the case for trial in the City court.

This would more effectually retard the trial than the other objection. The proceedings in the City courts are assimilated to those before Justices of the Peace, Acts 1880, p. 45. Appeals from these latter were tried *de novo*, Rev. Stats. sec. 2052, and not only *de novo* but the whole case was before the appellate court which must render such judgment as should have been rendered in the first instance. Code Prac. art. 1138. Neither could the requirement of summariness be complied with without disposing of the whole case on one appeal.

The suggestion made here that Judge Rightor was not competent to try the case because it had been assigned to Judge Tissot cannot be heard. No objection was made to his trying it, and even if it could have been effectual below it is too late to make it here for the first time.

Further complaint is made that the judge treated what the counsel called an exception as an answer. The judge properly so treated it. Pleadings are taken for what they really are and not for what their authors designate them. But whether exception or answer all defences must be made at once in summary proceedings. But in truth there was no valid defence as abundantly appears from the judge's return, and resort to the present proceeding appears to have been had for delay.

It is therefore ordered that the preliminary writs issued herein be set aside and that the application of the relators is refused at their costs.

Rehearing refused.

No. 9590.

THE STATE EX REL. MORGAN'S LOUISIANA AND TEXAS RAILROAD AND STEAMSHIP COMPANY VS. THE JUDGES OF COURT OF APPEALS OF THIRD CIRCUIT.

It is not until after a plea to the jurisdiction has been made and overruled below, that an application for a prohibition can be entertained by the Supreme Court. In the absence of an averment to that effect, the prayer for relief is premature and cannot be allowed.

APPLICATION for Prohibition.

Leory & Leory and *J. P. Blair* for the Relator.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This application for a Prohibition is based on the ground that the Circuit Court, to which appeals have been taken in a number of cases decided in favor of the relating company, has no jurisdiction over them, the matter involved in each exceeding, it is alleged, two thousand dollars.

The charge is that the Circuit Court "will, according to the mode of procedure which prevails therein, assimilate said motions to dismiss with the trial of said suits on their merits, and unless restrained, will hear and decide them to relator's great wrong and injury."

It does not appear that the motions to dismiss have been overruled, and that the court is about to proceed to try the merits of the cases.

The complaint is, *not* that the Circuit Court *has*, notwithstanding objection, maintained jurisdiction, *but* that the court *will* hear and decide to relator's great wrong and injury.

It is impossible to conceive how, *after* the relating company has, by the motions to dismiss, invoked the powers of the Circuit Court, this Court can be appealed to, in order to prohibit the exercise of those powers.

Non constat the Court of Appeals will not sustain those motions, if it be true, as alleged, that the matter involved in each case exceeds two thousand dollars.

Were the court, however, to overrule them illegally, the relators would be entitled to seek relief here against the effect of the ruling.

It has been repeatedly held, that it is not until *after* a plea has been made to the jurisdiction of a lower court and overruled by it, that the interference of the Supreme Court can be claimed.

There is no reason to depart from that wholesome rule of practice, which, well founded in law and reason, must continue to be enforced.

The application is dismissed with costs.

NOS. 9490 AND 9491.

THE STATE EX REL. CHAS. N. ROTH VS. JUDGE OF TWENTY-THIRD DISTRICT COURT.

(Consolidated.)

An order of court, authorizing the seized debtor to release his property from seizure on bond, although rendered on a rule contradictorily between the parties, is not a final judgment, but an interlocutory decree, from which no appeal lies unless such judgment may cause an irreparable injury to the party against whom it is rendered.

Section 3411, Revised Statutes of 1870, which authorizes the release on bond of property under seizure, applies to all executions, to seizures under executory process, as well as to executions under writs of *fieri facias*.

A seized debtor, who applies for permission to bond his property either from seizure or sequestration, cannot be required as a condition precedent to pay judicial costs or expenses incurred by the sheriff for keeping or cultivating the property pending the seizure.

The defendant owes no costs until final judgment on the controversy.

The right of appeal from an order setting aside on bond a writ of sequestration, depends alike on the irreparable injury which the order may cause to the party obtaining the sequestration.

APPLICATION for Mandamus and Prohibition.

D. N. Barrow for the Relator.

Respondent Judge *propria persona.*

The opinion of the Court was delivered by

POCHÉ, J. These two cases, involving rights of the same nature and between the same parties, have been consolidated, and are predicated on the following salient facts:

The relator, as holder of a mortgage note of J. F. Neely, obtained an order of seizure and sale against the property burdened with the mortgage, and pending the delays intervening before actual seizure, sued out a writ of sequestration against the same property.

After enjoining the execution of the writ, the defendant obtained, contradictorily with the seizing creditor and the sheriff, an order authorizing him to bond the property under the provisions of section 3411 of the Revised Statutes, and an order setting aside the sequestration on bond under the provisions of article 279 of the Code of Practice.

The judge's refusal to grant him an appeal from both orders is the subject-matter of relator's complaint.

In reference to the order releasing the defendant's property from seizure under the executory process, relator submits the following propositions:

1st. That the decree ordering the release of the property on bond, is a final and not an interlocutory judgment.

The real issue between the parties was the relator's right to seize and sell the defendant's property. A final judgment in the case would be such as would decide that, as well as all other points in controversy between the parties. C. P. 539.

The only question involved in, and the only controversy settled by, the order complained of was the right of defendant's retaining possession of the property pending the seizure.

It was only a preliminary matter, and the judgment which decided it was, therefore, an interlocutory judgment (C. P. 538), from which no appeals lies unless it may cause irreparable injury to the party against whom it was rendered. C. P. 566.

2nd. Hence relator's second proposition is that the judgment thus rendered against him would cause him irreparable injury, and he supports his assertion by the argument that section 3411, Revised Statutes, has no reference to executions under executory process, but only to executions under writs of *fieri facias*, that therefore there is no law authorizing the order complained of, and that the bond furnished thereunder is invalid and valueless, thus leaving relator without remedy for the injury which he might sustain under the effect of the order of release.

Under a proper construction of the only issue involved in the proceeding for mandamus, with a view to coerce the district judge to grant an appeal, the validity of his interlocutory judgment, is not ripe for discussion, as such a revision could only be made on appeal. Our jurisprudence has crystallized the rule that in cases where the debtor

has furnished the bond required by law and fixed and accepted by the court, the damages resulting from the releasing order cannot be considered as irreparable, for the plain reason that the bond of the debtor stands in lieu of the property, and is sufficient in law to hold the seizing creditor harmless against all the injuries which he may suffer under an illegal or improvident order of release. These considerations would afford a sufficient answer to the argument touching the irreparable injury to which he is exposed under the order which he seeks to annul and set aside.

But as the discussion has been met without objection by counsel for the respondent, we have considered the contention, and we reach the conclusion that it has no force.

Section 3411 of the Revised Statutes of 1870, is taken from Act No. 91 of 1842, which is entitled, "An Act to fix the time for making sheriffs' and coroners' sales and for other purposes."

The first section prescribes the mode of effecting all sheriffs' and coroners' sales, without exception and restriction. The second section vests the right of bonding their property to the defendants *in execution*, without definition or qualification of the modes of execution. We fail to see, either in the title or in the tenor of the act, any language or intimation justifying the suspicion that the law maker intended to restrict the provisions of the second section of the act to executions under writs of *fieri facias*, and to exclude from its operation seizures made by way of executory process.

In the absence of such language the unavoidable legal inference must be that the law maker meant precisely what he said, and that the law applies to all the executions without reference to the nature of the writ or mode of proceeding. Any doubt on the subject would be removed by the provisions of Article 745 of the Code of Practice, which prescribes the same mode of execution under executory process, as that which prevails for the sale of property seized in execution. A similar question was recently considered by this Court, and similar views were expressed in the case of E. Martin, tutor, vs. Lake, sheriff, et al., decided at Shreveport and not yet reported.

3rd. The point that the judge should have required the seized debtor to refund to the sheriff the costs of cultivating the plantation since the date of seizure, as a condition precedent to his right of releasing the same on bond, finds no better support in law or in jurisprudence. The defendant owes no costs until he has been cast in the suit. C. P. art. 549, Fink, executor, vs. Martin, 10 Rob. 147.

The same considerations dispose of the argument touching the crops growing on the plantation pending the seizure.

All these questions necessarily remain undecided until the final determination of the controversy between the parties. The order to bond being legal, the bond being sufficient, all of relator's recourse for damages, for expenses of cultivation, costs of suit, and for any and all incidental claims whatsoever, must in law be restricted to the bond.

We therefore conclnde that the judge did not err in refusing the appeal prayed for from his order authorizing the release of the debtor's property from seizure.

The writ of sequestration which had been obtained avowedly in aid of the order of seizure and sale, must share the same fate as the latter, in so far as the order setting it aside on bond is concerned.

In support of his right of appeal from that order, relator contends in substance: 1st. That the order will cause him irreparable injury. That argument is practically answered by our foregoing reasons on the question of the order of seizure; 2nd. He contends that an appeal lies absolutely from such an order, without consideration of the nature or extent of the injury which may possibly be occasioned thereby. And for sole support of his argument he quotes the following language from our opinion in the case of Street, 35 Ann. 515:

"Now it is settled that plaintiffs and defendants have a right to take a suspensive appeal from an order permitting the bond ing of property seized by *mesne process*." But that expression must be read with the statement in the following paragraph of the opinion, which reads thus: "By being divested of the possession of the mare sequestered in his hands, the relator may sustain an irreparable injury, just as considerable as that which either of the other parties might suffer." It is thus apparent that the opinion conforms to the established rule in such cases, which subordinates the right of appeal to the consideration of the possibility of irreparable injury, in consequence of the authorization to bond the property sequestered.

There is no error in the refusal of appeals in both cases by the district judge, and his ruling must therefore be upheld.

It is therefore ordered that the preliminary writs and restraining orders issued in these cases be set aside and cancelled, and that relator's applications for peremptory writs of mandamus and prohibition be denied at his costs.

No. 9519.

THE STATE EX REL. E. & W. B. JACOBS VS. ASSESSOR ET AL.

Even if private bankers stood upon the same footing as incorporated banks, and were subject to the same rules of assessment as to their capital, and were to be taxed only upon the surplus of their assets over their debts, they could not escape taxation by simply investing a portion of their assets, equivalent to such surplus, in non-taxable United States bonds; but such bonds, though themselves non-taxable, would nevertheless be counted as a part of the assets and as off-setting, to that extent, the liabilities. 29 Ann. 851.

The claim of relators being thus untenable, on their own theory, it is unnecessary to consider the more radical contentions advanced by defendants herein.

APPEAL from the First District Court, Parish of Caddo.
Taylor, J.

Wise & Herndon for Plaintiffs and Appellants.

Land & Land, Attorneys of Police Jury, and *M. S. Crain*, District Attorney, for Defendants and Appellees.

The opinion of the Court was delivered by

FENNER, J. Relators are private bankers in the city of Shreveport, and seek, in this proceeding, to procure reduction of an assessment under which they have been listed on the rolls, under the heading of "Merchandise or stock in trade and in hand employed in their business," in the sum of one hundred and eight thousand dollars.

They present the following statement of their assets and liabilities:

ASSETS.

Amounts due by banks	$ 87,272 84
Bills receivable	50,081 04
Cash	101,030 34
United States bonds	134,050 34
Amount due bank over drafts	117,574 41
Real estate and bank fixtures	12,828 71
Bremond Railroad certificate	3,000 00
Suspense account	5,834 00
C. G. Thurmond estate	1,479 00
	$512,151 93

LIABILITIES.

Amounts due banks	$ 5,842 50
Amounts due certificates of deposits	42,895 17
Amounts due individual depositors	304,797 03
Exchange account	22,789 02
Capital account	135,628 46
Protest papers	238 00
	$512,151 93

They quote the language of this Court in the case of City vs. Canal Bank, 29 Ann. 851, viz: "The capital of a bank which is subject to taxation, as capital, is made up of the balance of its assets remaining after deducting its debts, that portion of its assets exempt from taxation, and that portion which is taxed under another name than capital," and they say:

"Applying this rule to the instant case the result would be as follows—

Total assets May 30, 1884		$512,151 93
Less United States bonds		133,050 00
		$379,101 93
Total liabilities		376,285 47
Taxable balance		$ 2,816 46,"

But they entirely ignore the fact that, in the very case quoted, the Court held, in substance, that a bank could not escape taxation by merely investing a portion of its assets, equivalent to their surplus, in non-taxable securities, but that such securities, "though themselves non-taxable, shall be counted, as they are used and designed to be used as assets of the bank for the purpose of off-setting and extinguishing so much of its indebtedness."

Applying this rule, so self-evidently just and reasonable, we find, under relators' own theory of the case, a resultant taxable surplus far exceeding the amount for which they have been assessed.

This dispenses us from considering the much more radical contentions of defendants, to the effect that the assessment here is not of corporate capital and is not subject to the rules governing such assessment; that this is an assessment of property; that relators have no corporate character; that they are mere private merchants, and, as such, are taxable upon all their property without deduction of their debts; and that money received as irregular deposits and appearing as cash on hand or as invested in bills receivable or otherwise, is the property of relators and taxable as such, like any other property.

These are important questions, involving the interests of many, and we prefer to postpone any decision of them until some case is presented necessarily requiring it.

Judgment affirmed.

No. 9518.

THE STATE EX REL. LOUIS BARTHET ET AL. VS. W. T. HOUSTON, JUDGE, ETC.

The inferior court, whose judgment is appealed from, retains jurisdiction to determine primarily the character and effect of the appeal taken.

A suspensive appeal taken from an order dissolving on bond an injunction issued to prevent the commission of acts which, if done, would cause an irreparable injury, places matters in the condition in which they stood before the motion to bond was made, and in which they would have continued, had not such motion been filed. In other words: the effect of the appeal was to maintain the injunction in force. 33 Ann. 438, affirmed.

The district judge had authority to find and to punish transgressors for contempt.

APPLICATION for Habeas Corpus.

B. R. Forman and *E. H. McCaleb* for the Relators.

E. D. White for the Respondent.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The relators complain that they have been illegally committed for contempt, by the district court and, alleging rights to a *habeas corpus*, want of jurisdiction in said court and usurpation of authority by it, they seek to be released from custody. They had prayed for temporary relief which was not allowed.

The district judge elaborately returns that he had jurisdiction and properly exercised it.

The record shows that certain parties obtained an injunction to prevent the defendants from doing acts which, if committed, would cause irreparable injury.

Shortly after, the defendants obtained a dissolution on bond, the order being made by a district judge sitting in the absence of the one who had allowed the injunction. Subsequently, within the legal delay, the latter judge having resumed his functions, the plaintiffs in injunction obtained and perfected a suspensive appeal to this Court, from the dissolving order, which appeal is undetermined.

The relators, defendants in injunction, then did the acts prohibited by the court and were ruled in for contempt.

After trial, the district judge considered that the effect of the suspensive appeal from the dissolving order, was to place things in the condition in which they stood when the motion to bond was made—that is to continue in force the injunction as though the motion had never been allowed. On the question of fact he found that the relators had violated the injunction and he sentenced them to ten days imprisonment.

The main and indeed the only point upon which the relators avowedly rest their complaint, is that as soon as the suspensive appeal from the dissolving order on bond had been taken and perfected, the district court ceased to have jurisdiction over the cause, and therefore was incompetent to entertain the rule for contempt.

The law and jurisprudence are no doubt in that sense, but however fettered by an appeal, the court *a qua* has never been deemed absolutely stripped of jurisdiction to determine the character and effect of such appeal. 32 Ann. 814; 34 Ann. 90.

The appeal in this case does not affect the preliminary injunction; but only the validity of its dissolution on bond.

In the present instance the district court had jurisdiction to ascertain primarily, whether the appeal granted was or not suspensive and, if suspensive, what it was that it suspended. It had also jurisdiction, finding that it had suspended the effect of the order dissolving on bond, to decide that the injunction was or not in force and also that its prohibitions had or not been transgressed. It could punish for contempt. 36 Ann. 942.

It is clear, as a matter of law, that the effect of the suspensive appeal from the order dissolving the injunction on bond, was to leave matters in the condition in which they stood before the dissolving order was made; a condition in which they continued as though that order had never been granted. Butchers' Union vs. Judge, 33 Ann. 438, 494, 560, 134; also: 36 Ann. 192, 887, 192, 918; 34 Ann. 1181.

With the question of fact this Court has nothing to do.

We do not understand that the proceeding raises any issue beside that of jurisdiction just considered.

It is therefore ordered and decreed that the application herein for the nullity of the proceedings punishing for contempt, be refused with costs.

No. 9488.

THE STATE OF LOUISIANA VS. MICHAEL LAQUÉ ET ALS.

It cannot be claimed that an appeal is *devolutive*, where the appeal asked and allowed is *suspensive*, in express terms.

An appeal cannot be taken from a judgment before it is rendered, or a bill taken before the ruling is made by the court.

Taking an appeal *instanter* from a judgment quashing an indictment and ordering the discharge of the accused and the cancellation of their bonds, is not an act of acquiescence.

An appellant who prays for an appeal returnable according to law, is not chargeable with any fault, where he suggests neither time nor place, and where the judge fixes both of his own motion.

The filing of a transcript long before the return day is no cause for dismissing the appeal.

There is no reason to quash an indictment because of a defect in one count thereof, where the other count is perfect.

There is no repugnancy in the two counts of an indictment, one of which charges larceny and the other receiving stolen goods knowing them to be stolen.

In the count for receiving stolen goods, it is not necessary to aver the name of the thief or of the person from whom the goods were received.

APPEAL from the Twenty-sixth District Court, Parish of St. Charles. *Besançon, J.*

M. J. Cunningham, Attorney General, *G. Lèche*, District Attorney, *A. E. Billings* and *C. A. Baquié*, for the State, Appellant:

All appeals in criminal cases are suspensive, and no citation is requisite. Act No. 30, 1878.

The presence in court of a defendant in a criminal case when a motion for an appeal is made by the State and particularly after the information is quashed, is unnecessary. 31 Ann. 652; 32 Ann. 559.

Where an appeal is moved for, returnable according to law, and the judge fixes the return day other than that fixed by law, the appeal will not be dismissed. R. S. 36; C. P. 898; 6 Ann. 474; 31 Ann. 504; Ib. 595; 33 Ann. 1230.

It is unnecessary to file a transcript of appeal in the Supreme Court, until the return day as fixed by the judge's order granting the appeal. C. P. 587, 597.

Michael Hahn, Morris Marks and *F. B. Earhart* for Defendants and Appellees.

ON MOTION TO DISMISS.

The opinion of the Court was delivered by

BERMUDEZ, C. J. Not one of the reasons assigned for the dismissal of this appeal is founded on fact or law.

I.

The first ground is: that the appeal is *devolutive*, and the defendants have not been cited to answer it.

The motion of the district attorney was for a *suspensive* appeal, and the court ordered that a *suspensive* appeal be granted. R. pp. 26, 44, 45.

II.

The second ground is: that the appeal was moved for and granted after defendants were discharged and their bonds cancelled and the judgment acquiesced in by the State.

There is nothing in the record to show that the accused were discharged and their bonds cancelled before the appeal was asked by the State, or that the judgment was acquiesced in by the State.

The motion on this ground is not even sworn to, so that the averment rests for proof only on the *ipse dixit* of each defendant.

The record shows that as soon as the district judge rendered the judgment quashing the indictment and ordering the release of the accused, and cancelling their bonds, the State not only applied for a suspensive appeal, but took a bill of exception.

The State could not have appealed before the judgment was rendered, or excepted before the ruling had been made.

The protest of the State by appeal and bill repels the charge of acquiescence, even if it could stand without proof.

III.

The third ground is: that the appeal is not made returnable in ten days, according to law.

The State, through her representative, the district attorney, prayed for a *suspensive* appeal....to this Court...."returnable according to law," without suggesting or fixing any return day. R. pp. 26–7.

The district judge allowed the appeal returnable to this Court on the first Monday of November, 1885. R. pp. 26–7, 45.

It may be that the judge ought to have made the appeal returnable either at Monroe, Opelousas, or Shreveport, as the judgment was rendered May 13th, and this Court, then sitting in New Orleans, was soon to adjourn there, and that he was wrong in making it returnable here on the first Monday of November following; but the State is not chargeable with the action of the court. The State did all she was expected to do and no fault is attributable to her. This has been frequently held not to be a sufficient ground of dismissal.

IV.

The last ground is: that the transcript of appeal was not filed in this Court within ten days from the granting of the appeal.

The transcript was filed, not *after*, but long *before* the return day, namely: June 30, 1885, when it might have been filed here only on the 2d of November following. The transcript was surely in the clerk's office on that day.

The accused have no cause of complaint.

Motion to dismiss overruled.

ON THE MERITS.

TODD, J. This is an appeal by the State from a judgment quashing an information.

The defendants were charged in one count of the information with the crime of larceny, and in a second count, with receiving stolen goods, knowing them to be stolen.

The motion to quash is based substantially on the ground that the matters stated in the information and in the manner and form as therein set forth, are not sufficient in law, and that the counts in said information are cumulative and repugnant.

The substance of the reasons assigned by the trial judge for sustaining the motion may be found in the following from his written opinion:

"Because the State has omitted to mention in the second count the names of the parties from whom the stolen goods were received by the accused, or to detail any facts or circumstances connected with or surrounding the said delivery or receiving of said goods, by which a conclusion could be drawn as to who transmitted and delivered the said stolen goods to the accused so receiving them."

1. Even if this second count was defective, as held by the judge *a quo*, it was no sufficient reason for quashing the entire information. Where one of several counts in an indictment is good, a motion to quash will not be granted. Archibald, Crim. Pl. and Prac., 1 vol., p. 308, 7th ed. note.

The count for larceny is in strict conformity to law and is not assailed.

2. The offense charged in the second count consists in receiving goods stolen from some other person than the receiver, knowing them to be stolen.

It is not necessary in such case to aver who stole the property; from whom received; or that the thief, or the one from whom received, was unknown. Bishop Cr. Pr., p. 282; 2 vol. Archibald, 7 ed., p. 654, note; State vs. Moultrie, 34 Ann. 448.

This count is not, therefore, open to the objection raised.

3. There is no repugnancy in the two counts of this information. The two offenses charged belong to the same generic class, and it is settled by ample authority that both counts may be made in the same indictment, when separately made, as in this case. Archibald, Pomeroy notes, 8 ed., pp. 1164—1426-7; State vs. Crosby, 4 Ann. 434; State vs. McLean, Ib. 435, 437; State vs. Moultrie, 33 Ann. 1146.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be annulled, avoided and reversed and the motion to quash be overruled, and that the case be remanded for further proceedings according to law.

No. 9429.

CITIZENS' BANK OF LOUISIANA VS. J. B. MAUREAU ET ALS.

A party in possession of property as owner, and who is sued on an *assumpsit* of a debt secured by mortgage on said property, will not be allowed under a general denial to raise the issue that he has ceased to be the owner of such property, and that the same is owned by another person who is not a party to the suit and whose alleged title could not be thus passed upon.

The right of a party who has erected works or improvements on the soil of another, to claim compensation therefor, cannot be exercised as long as the owner of the soil has not elected to keep such constructions or improvements.

Creditors who *in concurso* over the proceeds of a sale of a plantation and appurtenances, claim privileges on movables attached to the realty, cannot enforce such privileges unless the specific items on which their privileges would attach have been separately appraised. The privilege is in the nature of a vendor's lien, and it will affect only the specific property sold to the debtor.

Privileges are *stricti juris;* they cannot be created by the convention of the parties; they must flow from the nature of the contract.

The testimony of a married woman in proof of a paraphernal claim against her husband in a sum exceeding $500, unsupported by corroborative circumstances, is insufficient to establish the claim.

The transferrer of several of a series of notes secured by privilege, cannot compete with his transferee, if he holds one or more of said notes, for the proceeds of the property burdened with the privilege, if they are insufficient to satisfy both claims.

APPEAL from the Civil District Court for the Parish of Orleans. *Tissot*, J.

A. J. Lewis for Syndic and Appellant.

Henry C. Miller, A. Pitot, Clay Knobloch, A. Grima, Hornor & Baker, J. H. Ferguson and *H. C. Cage* for Appellees.

The opinion of the Court was delivered by

POCHÉ, J. The principal feature of this most complicated litigation involves a contest between the plaintiff corporation as seizing creditor and numerous intervenors and third opponents, over the distribution of the proceeds realized from the sale of the movable and immovable property sequestered and seized in the case.

The manifold issues and innumerable questions raised and discussed by counsel could not be understood without the following statement of the pleadings, and of the salient facts bearing on the main issues to be disposed of, which we have gathered with great pains and after protracted labors from a chaotic transcript and countless original documents, which have been brought up as part of the record.

On the 14th of December, 1883, the Citizens' Bank brought suit against P. E. Tricou as actual possessor of the Greenwood plantation in the parish of Lafourche, for the purpose of foreclosing its stock and

contribution calls and its loan debt, exceeding together the sum of eleven thousand dollars, and secured by mortgage on that plantation.

In the suit the bank obtained a sequestration of the crop made on the plantation during the year 1883, or of such portions of said crops consisting of sugar and molasses, as had not been previously disposed of.

The case having been put at issue through an answer of general denial by Tricou, judgment was rendered against him in the sum above stated on the 23d of February, 1884, under which the plantation and appurtenances were seized and sold on the 17th of May following, all of which being adjudicated in block to the bank for $21,240—two-thirds of the appraised value thereof. Under the judgment, the buildings and improvements and all the appurtenances were appraised separately from the naked land, and in his deed the sheriff establishes the *pro rata* of the price of adjudication to be attributed to the buildings and improvements and other appurtenances respectively.

That feature of the judgment was the result of numerous interventions and third oppositions filed by sundry parties, who respectively urged liens and privileges on different and specific items of buildings and other improvements included in the seizure.

Those interventions were as follows:

1st. The syndic of A. F. Himel presented a claim of $32,941, in reimbursement of advances of money, supplies, building materials and machinery, made by said Himel as the factor and commission merchant of one J. E. Logan, the lessee of the plantation during the years 1881, 1882 and 1883, $20,000 of which were for such advances alleged to have been made during the current year 1883, and for all of which a ranking privilege was claimed on the crop, the buildings and improvements, and on the working animals and implements of husbandry.

To that action the syndic engrafted a demand for the same amount, sounding in damages against the Citizens' Bank for an alleged violation of an agreement made by the bank, as part of the contract between Himel as merchant and Logan as lessee and Tricou as lessor, by which the bank had stipulated not to seize the leased premises or otherwise interfere with the lessee in the cultivation or saving of his crop, before the middle of January, 1884.

2d. Bourgeois and Lefort urged a claim for lumber furnished in the sum of $45 00, with privilege on the sugar-house.

3d. L'hote & Co. claimed the sum of $669 72 as a balance on certain cabins and materials therefor furnished to the plantation, with privilege on the property thus sold by them.

4th. Lawrence Keefe urged a claim of $473 94, for sundry articles of machinery and repairs on the mill and engine, with privilege on the engine.

5th. James Reagan intervened as subrogee of A. Carrière & Sons on a claim of $950 00, as the purchase price of four certain mules described in the testimony, and of a horse, with privilege on the animals sold.

6th. Mrs. S. P. Logan, wife of the lessee, J. E. Logan, claimed the sum of $3200 out of the proceeds of the sale of one undivided half of all the mules, agricultural implements and all other movable effects on the plantation at the date of seizure, on the ground that said described property had been transferred to her in full ownership by her husband as a *dation* in payment, on a claim of $4458 which she had against him for the restitution of her paraphernal funds received for her by her said husband.

7th. A Carrière & Sons, to whom the Citizens' Bank, plaintiff herein, was subsequently subrogated, urged a claim exceeding $11,000, as holders in collateral security of notes aggregating some $15,000, acquired by them in due course of business from A. F. Himel, said notes being included in those representing the advances of the current year, making up the sum of $20,000 hereinabove mentioned as evidenced by the factor's contract between Himel the commission merchant and John E. Logan the lessee.

The various issues presented by the interventions were dealt with by the district court, as in the case of a *concursus*, and the trial resulted in a judgment dismissing the intervention of the syndic of A. F. Himel, and maintaining all the other interventions for the sums respectively claimed by the intervenors. The merits of the judgment as regards each of the interventions will be considered in another part of this opinion.

The syndic alone has appealed from that judgment; and the defendant Tricou has appealed from the judgment against him on the main action, rendered on the 23rd of February, 1884.

His contention is that he could not be condemned as proposed in the judgment, for the reason that he had no title or ownership to the Greenwood plantation at the time that this action was brought against him. The grounds of this action are as follows:

Tricou acquired the Greenwood plantation by purchase from Mrs. J. B. Maureau, who had bought it in 1866, at a marshal's sale, under the confiscation act of Congress of 1862; up to which time said plantation

had been the lawful property of Gen. Braxton Bragg, for whose alleged offenses the confiscation sale had been made.

It is then stated that by the death of Gen. Bragg, which had occurred before the date of this suit, the title of Tricou, which was that of a life-estate only, had terminated and that the title to the fee had then and thus reverted to the legal heirs of Gen. Bragg, who were the lawful owners of the property at the time of the institution of this suit.

Had this issue been tendered by the pleadings, the argument used by appellant would be very plausible, if not unanswerable. But, as stated in the first part of this opinion, Tricou's only defense was the general denial—under which no such issue as this, which was tendered on trial only, and now on appeal by way of argument, can be entertained. The plainest rules of practice are sufficient to justify the complete elimination of this issue in the present controversy. An adjudi cation of that issue under the pleadings as made and as presented, might have the effect of annulling the sale made under the judgment, and of settling titles to a large estate, in the absence, as parties to the suit, of the heirs of Gen. Bragg, who are the alleged owners of the plantation.

Hence, we find no authority or power to justify us to disturb the judgment on this ground. In a proper proceeding, and with the proper parties before the Court, the defendant would doubtless find a remedy from the error which he invokes in this connection.

1st. These considerations will serve to dispose of some of the positions assumed in this Court by the syndic of A. F. Himel in reference to the judgment which he appeals from and which distributes the proceeds realized from the sale of the plantation and appurtenances.

Feeling and appreciating the weakness of his contention for a priv ilege for his advances on the buildings, improvements, working animals and movables generally, which had been attached to the plantation during the lease, of which Tricou was joint owner with Logan the lessee for one-half, the syndic appellant advances the following argument in support of his claim to at least one-half of the proceeds realized from the sale of that specific property.

He bases his contention on the right of Tricou to claim as his property all the improvements which he had placed on Greenwood plantation during his occupancy under his life-estate—and as the rights of Tricou have been seized by Himel under a judgment which he had obtained against Tricou on confession for $32,941, the full amount of his claim against Logan and Tricou *in solido;* the syndic as judgment cred-

itor has the legal *status* and power to enforce all the rights which Tricou had in the premises.

But appellant is met by an insuperable objection emanating from the very law which he invokes in support of his claim. Article 508 Civil Code, reads: "When plantations, constructions and works have been made by a third person, and with such person's own materials, the owner of the soil has a right to keep them or to compel this person to take away or demolish the same."

Then the article provides as follows: "If the owner keeps the works, he owes to the owner of the materials nothing but the reimbursement of their value and of the price of workmanship, without any regard to the greater or less value which the soil may have acquired thereby."

Now, either Tricou was the owner of the soil at the time of the seizure, or, as the syndic seems to contend, the legal heirs of Gen. Bragg were the owners thereof. If Tricou was the owner, the claim falls because the improvements, having been attached to his own soil, became part thereof and as such became with the land subject to the mortgage of the Citizens' Bank. If the heirs of Bragg were the owners, Tricou has not the power to claim compensation for his improvements before the owner of the soil has elected to keep them. Kibbe vs. Campbell, 34 Ann. 1163, and authorities therein cited.

Hence it follows that under the pleadings in this case the syndic's contention cannot be entertained, and that such balance of the proceeds realized from the sale of the improvements as may remain in the hands of the sheriff after paying the special privileges to be recognized in the decree which will be rendered herein, might eventually be applied to the unpaid portion of the mortgage of the Citizens' Bank, unless in a proper proceeding it should be judicially ascertained that Tricou was not the owner of the soil at the time of the seizure. In that event the law quoted from the Civil Code would take its natural course, and the syndic appellant might properly enforce the rights of his judgment debtor to a portion of the proceeds. To that end his rights will be reserved in our decree.

It needs no argument to dispose of his pretentions to a privilege on the buildings and improvements as a security for his advances, although such a privilege was stipulated in his act of pledge with Logan. The law confers no such privilege, and none can be enforced —a privilege cannot be created by convention between the parties, it must derive its existence from the nature of the contract and from the law applicable thereto.

Himel's claim against the Citizen's Bank on account of its alleged violation of the agreement for a stay of execution, cannot be enforced in an intervention involving the proper distribution of the funds realized from the very execution complained of as untimely and illegal. Such a demand can have no possible connection with the only matter under consideration which is the disposition of a fund to be distributed, and in which this appellant seeks to participate. It is simply a claim for damages, and could be enforced in a direct action only. His rights to such an action are reserved. His intervention should be dismissed as in case of non-suit.

We shall now proceed to consider the other interventions.

2d. The privilege claimed by Bourgeois and Lefort should have been rejected, for the reason that the sugar-house on which they attach their privilege was not appraised separately.

The appraisement on this score was as follows: "All the buildings and improvements and all its appurtenances appraised at $7,120—*pro rata* proceeds for the same as shown by the sheriff's deed, $2,835 56.

It is true that the sugar-house was included in that appraisement—but it appears from the record that there were many other buildings; such as a dwelling-house and out-houses, stables, laborers' quarters, etc., and these were also included under the same heading, hence the impossibility to ascertain the appraised value of, or the *pro rata* brought by the sugar-house.

3d. Similar reasons apply to, and dispose of the privilege erroneously allowed to L'hote & Co. Their claim was for a privilege on the cabins and appliances furnished by them to the Greenwood plantation—but those cabins were not separately appraised, hence the court cannot legally ascertain the amount realized from the sale thereof.

4th. We find no error in the allowance made in favor of Lawrence Keefe. The engine which was subject to his privilege was appraised separately, and it appears from the sheriff's deed that the *pro rata* proceeds realized therefrom, amount to the sum of $597 38.

5th. We find error in that part of the judgment which recognizes a privilege in favor of James Regan, subrogee. for the full amount of his claim of $950, and directs the payment thereof out of the "proceeds of sale of the mules sold herein." The record shows that thirty mules were "sold herein" as attached to the Greenwood plantation, and that the *pro rata* proceeds realized therefrom amounted to $1,194 76. It would indeed be a violent presumption to hold or contend that the four mules sold by Regan to the lessee had brought $950 of that amount.

The mules sold by this intervenor were not appraised separately, and if his mules were yet on the plantation, which is not shown affirmatively by the record, they were appraised and sold in block with twenty-six other mules, and the record contains no evidence of their separate value, or of the amount realized from the sale thereof. Again, that feature of the judgment is incompatible with the allowance made in the same judgment in favor of Mrs. Logan, under the alleged *dation* in payment of her husband to her. That sale includes one-half of the thirty mules in question. The practical effect of that adjudication involves the problem of paying in full $597, the half realized from the thirty mules, and $950, say $1,547 and interests with a fund amounting to $1,194 76. The privilege claimed by Regan must therefore be rejected.

6th. We are also constrained to differ with our learned brother of the district court in his conclusions touching Mrs. Logan's claim.

Her contention is that, at the date of the sale, she was the absolute owner of one-half of thirty mules and of other movable property included in the seizure, aggregating per appraisement, the value of $2,825, and that she was also the owner in full of other movable property appraised at $435, all of which had been transferred to her by her husband in part payment of her paraphernal funds, amounting to $4,458 20. The whole evidence introduced by her, in proof of her claim, consists of the act of *dation en paiement*, of her own testimony and that of another witness. The act proves nothing but the intention of the parties—the other witness avowedly knows nothing of the correctness of her claim—and she is thus alone to establish a claim of $4,458.

That evidence is far from being satisfactory, and falls short of the requirement of Art. 2277 of the Civil Code, touching corroborative circumstances supporting the testimony of one witness in proof of obligations exceeding five hundred dollars. Cutler vs. Collins, 37 Ann. 95. Her claim should have been defeated.

These views eliminate from discussion many other points discussed by counsel in connection with the claim.

7th. There is no error in the disposition made by the district court of the proceeds realized from that portion of the crop of 1883, which had been sequestered in the suit of the Citizens' Bank, and which were applied by the judgment in part satisfaction of the privilege securing the notes acquired from the factor Himel by A. Carrière & Sons, and transferred *pendente lite* to the bank.

The record does not show what amount was thus realized from that source, but it is conceded that it was insufficient to satisfy the amount actually due to the Carrières; that amount is fixed by the judgment at $11,000; as contended for by appellant, it should be reduced to $10,563—but that error is of no moment, as the proceeds of the crop are avowedly insufficient to satisfy the claim even as thus reduced.

The syndic and appellant, holding one of the notes of the series making up the advances of $20,000, erroneously contends that he should partake in the *pro rata* realized from the crop. Himel, as the transferrer of the notes held by the Carrières, could not compete with his transferees in the proceeds of the property burdened with a privilege to secure said notes, if they are not sufficient to satisfy the claims of both. Abney & Co. vs. Walmsley et al. 33 Ann. 589; Reine vs. Sack, 31 Ann. 859; Barkdull vs. Herwig, 30 Ann. 618; Salzman vs. His Creditors, 2 R. 243.

His syndic, as his assignee, cannot exercise rights which he himself did not possess.

There is no force in the contention as advanced by this syndic appellant, that the Citizens' Bank is estopped from claiming the ownership of this claim under the subrogation from Carrière & Sons, by its judicial recognition in this suit, of the ownership thereof by Carrière & Sons. He has no interest in law to raise such an issue. The Carrières do not complain, and he cannot be allowed to champion their supposed rights of ownership; whether the amount is received by the Carrières or by the bank, is an incident of no concern to this appellant who, in either event, is not in the least affected in any of his rights. 34 Ann. 907, Bothick vs. Greves et al.

We have thus disposed of all the pertinent contentions which are presented under the pleadings, and we reach the conclusion that the funds now remaining in the hands of the sheriff after the payment of Lawrence Keefe's claim, and of the costs incurred in the *concursus* below, should be retained by him until, and subject to, the final adjudication of the rights which are herein reserved in favor of sundry parties to the proper distribution of such balance.

It is therefore ordered, adjudged and decreed that the judgment rendered on the 23d of February, 1884, be affirmed at the costs of the defendant Tricou in both courts, subject to the reservation hereinabove made in his favor; and that the judgment rendered *in concurso* on March 30, 1885, be amended as follows:

Said judgment is affirmed in so far as it recognizes the privilege of Lawrence Keefe on the proceeds of the mill and engine, and in so far

as it enforces the privilege of the Citizens' Bank as subrogee of A. Carrière & Sons on the proceeds of the sequestered crop of the year 1883; and that said judgment be amended in so far as it dismisses the intervention of Himel, syndic, which intervention is hereby rejected as in case of non-suit, with all the rights reserved in this opinion, and that said judgment be annulled, avoided and reversed in all other particulars.

It is further ordered, adjudged and decreed that the privileges claimed by Bourgeois & Lefort, G. L'hote & Co., James Regan, S. P. Logan, wife of J. E. Logan, be rejected as in the case of non-suit, and that their respective interventions be hence dismissed at their costs respectively in both courts.

No. 9347.

THOMAS M. KILLELEA ET AL. VS. LAWRENCE F. BARRETT ET AL.

The heirs of the wife, upon her death, become joint owners with the surviving husband of the community property; but it is not necessary that such heirs or the succession of their mother should be made parties to a proceeding to foreclose a mortgage upon the property contracted during the existence of the community.

They cannot, however, be divested of their title to one half of community lands by a sale of the same under executory process instituted after the death of their parents and directed against them as minor heirs of their father to pay a community debt, where they were represented in the proceedings by a *tutor ad hoc* who never qualified by taking the prescribed oath. Where what seems to be the entire record of the executory proceeding is in the transcript of appeal and no oath of the *tutor ad hoc* appears therein, the case will be remanded to enable the party interested to supply the required proof, if it exists.

APPEAL from the Civil District Court for the Parish of Orleans. *Houston*, J.

James D. Coleman for Plaintiffs and Appellees:

1. Upon the death of the wife, the husband's authority as head and master of the community is at an end. C. C. 2506; 15 Ann. 636; 23 Ann. 638; 29 Ann. 663; 32 Ann. 849; 33 Ann 584. Upon the dissolution of the community by death, one-half of the community property vests in the heirs and the other half in the surviving spouse, subject to the payment of the community debts. Ib.
2. The dissolution of the community operates a complete vestiture of title of one-half the community property in the forced heirs of the deceased spouse, and the surviving husband has no power or authority to alienate, encumber or affect the interest of the heirs. 15 Ann. 636; 23 Ann. 638; 29 Ann. 663; 33 Ann. 584.
3. The dissolution of the community by the death of the wife is as effectual as a judicial dissolution during her life. 33 Ann. 585, and authorities cited.
4. A community obligation is a debt or real charge upon the undivided half interest of the heirs in the community property, and like all debts is extinguished by prescription. C. C 3457, 3459, 3528.
5. To acknowledge a right upon real estate, or to renounce or waive a prescription as to a real right, involves the power to alienate. C. C. 3462.

6. The prescription which operates a release of a debt has also the effect of releasing the owner of an estate from every species of real right to which the property may have been subject, if the person in possession of the right has not exercised it during the time required by law. C. C. 3529.
7. Plaintiffs have the undoubted right to institute this suit. 32 Ann. 849; 33 Ann. 769; 29 Ann. 665; 7 R. R 183.
8. A tutor *ad hoc* must take an oath before he can legally represent a minor. C. C. 313.
9. Where the probate court issues an order of sale of succession property, until said order is set aside in the manner pointed out by law it has full force and effect, and no other court has power, jurisdiction or authority to seize the property pending the seizure by the probate court. 15 Ann. 636; 31 Ann. 52; 32 Ann. 249.
10. Where the law requires a tutor to be sworn, until he takes the oath prescribed by law his acts on behalf of the minors are nullities; and before the rights of minors can be legally divested, it must be shown that the tutor claiming to represent them has taken the required oath. C. C. 313; 11 R. R. 503; 12 R. R. 636; 3 Ann. 562; 6 L. R. 355; 7 L R. 543.
11. Heirs have ten years after majority to revendicate property illegally sold. Rents and revenues follow the real estate by right of accession, and partake of its nature. C. C. 499; 33 Ann. 769, 1178; 3 L. 549; 14 Ann. 169.
12. Heirs need not tender price before suing to recover their interest in property of which they have been illegally dispossessed. 33 Ann. 769.
13. The liability of heirs to reimburse a *bona fide* purchaser only extends to that which is shown to have been expended for their account or inured to their benefit. Where it does not appear that the purchase price was received by or benefited the heirs, there can be no tender required, nor can a recovery be had. 33 Ann. 769.

Geo. L. Bright for Defendant and Appellant.

The opinion of the Court was delivered by

TODD, J. This is a petitory action, in which plaintiffs claim the ownership of an undivided half of certain city property, as heirs of their deceased mother, who was common in property with her husband, their father. They claim, also, rents and revenues.

The main defense of Barrett, in possession of the property, is that he acquired the same by a judicial sale made under a proceeding to enforce payment of a mortgage debt contracted by the father of plaintiffs during the existence of the community between him and the mother of plaintiffs.

There was judgment in favor of three of the plaintiffs, recognizing them as owners of three-fourths of one-half of the property described and referring the matter of rents and revenues to a notary for adjustment. The claim of one of the plaintiffs (Mrs. Shaff) was rejected, and she has not appealed. During the pendency of the proceedings in the lower court, Barrett died, and his legal representatives were made parties, who have appealed from the judgment.

The appellees became the owners of the property, or of the interest therein as claimed, by inheritance from their mother, who died in 1862.

This portion, however, descended to them burdened with its share of the community debts. The entire property was sold to pay a mortgage debt contracted during the existence of the community, on the 22d of July, 1871. This sale took place after the death of plaintiffs' father, Thomas Killelea, and was by executory process directed against his succession, purporting to be represented by his legal heirs, who were all then minors, except Mrs. Schaff.

The appellees having become the owners of their said interest in said property, and many years before the proceeding for its sale was instituted by Barrett, their right thereto could only be divested by a strict compliance with all the requirements of the law relating to judicial sales.

It must be borne in mind that plaintiffs, at the time their said interest was acquired and at the time it purports to have been divested, were minors. And it is a rule to which there is no exception that the property of minors cannot be alienated unless after a rigid observance of the legal formalities prescribed therefor.

The plaintiffs assail the title of the defendant—the sheriff's sale, under which he claims on several grounds. Among others are these:

1st. That the proceeding was directed solely against their father's succession and not against their mother's or them as her heirs.

We do not think this was necessary. As before stated, the debt was a community debt, to enforce which the proceeding was instituted. The sole debtor was Killelea, the husband, and the community property was subject to the debt, and it was sufficient to make the debtor if alive, or his legal representatives if dead, parties to a proceeding to coerce its payment. This is settled by the later authorities which we follow. 26 Ann. 230.

2d. It is also charged that the debt was extinguished by prescription when the sale took place, and the mortgage securing it had thereby ceased to exist.

The debt was contracted in 1859, but had been frequently acknowledged by Killelea, who besides, had paid the interest on the same regularly, and the mortgage had been seasonably reinscribed; and we think even were the debt prescribed, its prescription asserted for the first time after the sale could not affect the validity of the sale or its consequences. 23 Ann. 300; 20 Ann. 201.

3d. It is lastly urged that three of the plaintiffs—appellees herein—were not parties to the executory proceeding in any capacity whatever, and were not legally represented therein; that the *tutor ad hoc*, who

purports to have been appointed to them, never qualified by taking the oath prescribed by law.

This presents a very serious question. In order to divest their title to the property, it was necessary that the proceeding should have been conducted contradictorily with some one—either with the minors or with the succession of the debtor. The succession of Killelea was not represented by an administrator; hence the question is whether the minors were represented, or through them the succession. We find in the petition for the executory process it is stated that the three plaintiffs (appellees) were minors unprovided with a tutor, and it was asked that a *tutor ad hoc* be appointed to them. There is an order of the judge making the appointment, but it nowhere appears in the record of that proceeding—which would seem to have been transcribed in its entirety in the transcript—that the appointee ever took the oath prescribed by Art. 313 C. C., that he ever accepted the appointment, or did a single act under it. His qualification was essential to his authority to represent the minors.

The dictum in the case of Sadler vs. Henderson, referred to, is not opposed to this. That referred to a curator *ad hoc* appointed under Art. 116 C. P. Such appointee is not required to take an oath. But where a party applies for the appointment of a tutor *ad hoc*, for the reason doubtless that the minor can only or best be represented in the proceeding by a tutor, such tutor, like all other tutors, must take the oath required.

The counsel for the defendant invokes the legal presumption in favor of judicial sales as obviating the necessity of express or direct proof on this point. As stated before, where the property of a minor purports to be alienated under legal process, it devolves upon him who sets up such opposing title to show affirmatively a full compliance with the requirements of the law. And such title is open to all objections of fact and law, without the same being specially pleaded.

Inasmuch, however, as this and other grounds of nullity against this sale were not pleaded in the court below and the defendant put on his guard thereby, but urged only in argument before this Court so far as the record discloses; and as it is possible that the oath of the tutor may have been taken and filed, but unintentionally or accidentally omitted from the transcript, we think the defendant should not be concluded by the omission, but the case be remanded to enable him to supply the proof required, if it exists.

The presription of five and ten years pleaded cannot prevail. The first protects only against informalities in judicial sales and irregular-

ities in the proceedings, connected therewith. Here the defect charged is of so radical a nature as to render the sale an absolute nullity. As to that of ten years, it is not shown that ten years intervened between the majority of the plaintiff and the institution of this suit. The prescription pleaded against the right to recover the rents and revenues is equally unavailing. This was settled in suit of Walling's Heirs vs. Manfield, 33 Ann. 1174.

The plea of want of tender of the price is likewise without merit, for two reasons: one, that the defendant as the mortgage creditor provoking the sale, was himself the purchaser, and retained in his own hands the entire price. 24 Ann. 473; 3 Ann. 343.

The other, that where the purchaser is in bad faith—as he would be in case the sale was an absolute nullity, and such nullity is here urged—no previous tender is necessary. Self vs. Taylor, 33 Ann. 769; Wood vs. Nichols, Ib. 744, 746; 24 Ann. 253; 31 Ann. 371.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be annulled, avoided and reversed, and that the case be remanded to the lower court to be proceeded with according to law, the appellees to pay the costs of appeal; and those of the lower court to abide the final issue of the case.

Dissenting Opinion.

Manning, J. I dissent. There is but one question in this case that need be examined, viz whether the succession of Mr. Killilea was represented in the executory proceedings. I understand it is now settled that in foreclosing a mortgage upon community property given by the husband, it is not necessary to make the wife's heirs or representatives parties if she has died after the mortgage and before its foreclosure. In my opinion the wife's heirs have no interest in the property until the debts are paid. These children are necessary parties only because the succession of their father has no administrator, and they are called in to represent his succession, and therefore the rules concerning the forced alienation of minors property are not involved.

The whole case turns in the opinion of the court on the non-production of the tutor's oath. I think in such case the presumption should be that the tutor did his legal duty, and at any rate it is one of those omissions to which the prescription of five years is applicable. It will be brittle thread for titles to hang on if the production of a loose slip of paper containing an oath is to determine whether the title be good or bad.

I think the defendant should have judgment.

ON APPLICATION FOR REHEARING.

TODD, J. Both parties have applied for a rehearing. We have attentively considered both applications, and have not changed our minds as to the correctness of our previous decree.

The point in those motions deserving the most serious consideration is that touching the prescription of five years in the defendant's application.

It is earnestly urged that the omission of the *tutor ad hoc*, appointed to represent a minor party to an executory proceeding, to take the prescribed oath, is an informality connected with or growing out of a public sale, which is fully covered by the prescription mentioned; and we are cited to the cases of Fraser vs. Zylice, 29 Ann. 534; Ruth vs. Citizens Bank, 28 Ann. 570; Mulholland vs. Scott, 33 Ann. 1043; Holt vs. Hart and Hebert, Ib. 673. We have carefully examined these decisions and they do not sustain the counsel's proposition. It will be seen that the informalities there treated of, refer exclusively to those occurring after judgment, and connected with and relating to proceedings pertaining to the execution of the judgment; as for instance the sale of minors property for less than its appraisement, want of notice of seizure, notice of judgment rendered by the defendant, and waiver of notice of seizure and sale.

Now, in our opinion, a failure to give notice to a minor defendant in an executory proceeding, or his legal representative, is not an informality connected with or growing out of a public sale, but is something that is absolutely essential to the legal effect of the order of seizure and sale itself. 6 R. 192; 9 R. 8; 14 Ann. 105.

This notice is equivalent to a citation in ordinary proceedings, and just as indispensable. Can it be pretended that a failure to cite a party in the latter proceeding would, in any way, relate to the sale of property under the judgment rendered in such proceeding? Rather such failure would relate to the judgment and make it absolutely null. So in executory process a writ of seizure and sale issued without previous notice to the debtor, would be alike void.

The rehearing asked for is refused.

MANNING, J. A rehearing should be granted.

No. 9458.

SUCCESSION OF CHARLOTTE PIFFET—OPPOSITION OF C. H. TEBAULT.

A contract for over five hundred dollars may be proved by one witness and corroborating circumstances. Where the contract was to pay two thousand dollars for exclusive and undivided attention to a childless woman of large property who was apparently sinking and had made no will and ardently desired to make one, the intensity of her desire to gain time and strength to make a will and the large property at her disposal, and the fact that the physician gave his undivided attention as the contract required, are corroborating circumstances sufficient to support the oath of one witness and establish the contract.

Where one declares upon a contract he cannot recover upon a *quantum meruit*, but while testimony of value of services is inadmissible under the contract, it is admissible to shew the reasonableness of the contract and that it is one likely to be made under the circumstances. The contract must first be proved, and then its reasonableness may be shewn by proof that it was not grinding but fair.

The correct repetition of conversations is the most difficult feat of memory and of expression, and therefore the narration by a witness of the conversation of a dead person is the weakest of all evidence. The promise of a dead person to pay the debt of another cannot be proved by parol.

APPEAL from the Civil District Court for the Parish of Orleans. *Houston*, J.

B. R. Forman for Opponent and Appellant.

T. Gilmore & Sons for the Executors, Appellees:

The opinion of the Court was delivered by

MANNING, J. The executors of Charlotte Piffet filed a provisional account placing Dr. Tebault thereon as creditor for two undisputed items and allowing him $300 besides for attendance upon the deceased in her last illness. He opposed it claiming two thousand dollars for the last service and $352 for attendance upon Mrs. Knapp a niece of the deceased.

The executors excepted that the opponent had set up a special contract for the services during last illness and at the same time claimed under a *quantum meruit* and prayed that he be required to elect, and this exception having been sustained, he elected to stand on the contract.

The sole witness to the contract was Dr. Tebault himself, but his counsel insists that his testimony is supported by corroborating circumstances more than sufficient to bring the case within the rule of art. 2277 Rev. Civ. Code.

Mrs. Piffet was an aged woman with large fortune and without children. The inventory of her estate is over four hundred thousand dollars, the accumulation of her own thrift and good management.

She had suffered many years with cancer of the womb. Her death was imminent on the first of January 1884 when Dr. Tebault, sent for in haste, found her exhausted and apparently *in extremis*. His visit lasted thirty hours and he revived her, but had scarcely reached his home when he was recalled, found her again collapsed, and again resuscitated her.

She had made no disposition of her property and notwithstanding this neglect, it appears that when confronted by death she earnestly desired to make a will. She adjured him to stay with and watch her, and to keep her alive until she could get strength to make her will. He said he had other patients who needed his attention and he could not devote himself exclusively to her. Then she offered to give him two thousand dollars if he would abandon every other patient and attend to her alone. He accepted the offer and gave her his undivided attention until the 17th. of the same month when she died. She made her will on the 9th. and a codicil on the 11th.

He had to do much more than prescribe for her and watch her. She would not have a professional nurse. He was attendant and nurse as well as doctor. The nature of the disease suficiently indicates the kind of services he had to perform without going into the details supplied us by the record.

It is a strong corroborating circumstance that this old and rich woman ardently wished for time and strength to dispose of her property, and the promise of an unusually large fee was a natural expression of that wish, a proof at once of the intensity of the desire and of the largess she was willing to dispense to attain its fulfillment. For what was that sum to one who coveted a few more days of life that she might dispose according to her own mind of that to the acquisition of which her life had been given? A strong corroborating circumstance is the fact that Dr. Tebault gave up his other practice and devoted himself exclusively to Mrs. Piffet, performing menial services even and watching her with unremitting attendance.

Several eminent physicians testified that the services of Dr. Tebault were fully worth the sum claimed. Their testimony was given after the details of those services of various kinds had been made by him accompanied by statements of the offensive developments of the disease. The testimony was objected to by the executors because the *quantum meruit* claim had been abandoned.

There can be no doubt of the correctness of the principle asserted by the executors that where a plantiff declares on a contract, he can-

not recover on a *quantum meruit*. But the testimony, while inadmissible to prove the value of the services, is competent to shew the reasonableness of the contract. Having declared upon a contract, he must first have proved it, which we think he has done by his own oath and corroborating circumstances, and then evidence that the contract was one likely to be made under the circumstances and was reasonable in itself was properly heard. Bright v. Metairie Cemetery, 33 Ann. 62.

We do not leave out of sight the suspicion with which legists have always regarded the influence of physicians and others upon a sick person, and the rigour with which jurists have annulled donations made under undue influence. art. 1489 Rev. Civ. Code. Domat *Droit Public*, lib. 1, tit. xvii, sec. 1 & 12. But that made it only the more becoming that proof should be tendered to shew that the contract set up is one that a sick person, circumstanced as was this testatrix, would naturally make, and that other men of the same profession as the opponent would think not exorbitant and not improper to be accepted.

The claim preferred by the opponent for services rendered Mrs. Knapp rests upon a very slender basis. This lady was the niece of the testatrix, had been an inmate of her house previous to marriage, had been reared by her, and is one of her legatees. She was married in 1878. Mrs. Piffet paid Dr. Tebault's bills for attendance upon Mrs. Knapp in 1879 and 1880. He presented his bill for 1881 and it was not paid by Mrs. Piffet, and he then presented it to Dr. Knapp. No further application to Mrs. Piffet for the payment of that bill was made, and considering her ample means and her business habits it is not unreasonable to conclude that had Dr. Tebault looked to her for it any longer it would again have been presented.

There is an attempt to shew that Mrs. Piffet bound herself to pay continuously for medical services to Mrs. Knapp in conversations had during the first years of the latter's married life, but the narration of conversations correctly is the most difficult feat of memory and of expression, and of all evidence the narration of a witness of his conversation with a dead person is esteemed in justice the weakest. Besides, this is an attempt to prove by parol evidence the promise of a deceased person to pay another's debt, and that is textually prohibited. art. 2278 Rev. Civ. Code.

The judgment below was adverse to the opponent but with reservation of his rights to bring another action on a *quantum meruit*. We think it is error. Therefore

It is ordered and decreed that the judgment of the lower court is reversed, and that the opponent C. H. Tebault have judgment sustaining his opposition so as to increase the item upon the executors' account for medical attendance during last illness to two thousand dollars, and that the opponent's claim for services rendered Mrs. Knapp which was disallowed by the executors is rejected at his costs, the succession paying the costs of the other item in the opposition and of appeal.

No. 9461.

Butchers' Union Slaughter-house and Live Stock Landing Company vs. Crescent City Live Stock Landing and Slaughter-house Company.

The opinion and decree of this Court in the case of the Crescent City Slaughter-house Co. vs. The City of New Orleans, 33 Ann. 934, was an authoritive judicial decision that Articles 248 and 258 of the Constitution of 1879 were valid and impaired no contract right of said company; that the city of New Orleans had the lawful right, with the concurrence of the Board of Health, to regulate the business of slaughtering within its limits, and to designate places where such business could be conducted and also, by necessary consequence, that all persons complying with such regulations had the right to pursue said business within such designated limits. This decree was subject to reversal only by a judgment of the Supreme Court of the United States, and until so reversed, was binding as absolute law upon the parties thereto.

In prosecuting a subsequent suit in the U. S. Circuit Court for an injunction to restrain a party complying with the regulations of the city from prosecuting said business at places so designated, which suit had no foundation except in the assumption that the decree of this Court was not law, the defendant corporation acted without probable cause and can find no sanction for its course, either in advice of counsel or in the decision of the circuit court sustaining such assumption. The decree of this Court fully advised the parties what was the law, and it was not justified in acting contrary thereto upon any advice whatever.

The record sufficiently establishes that the party in bringing said suit not only acted without probable cause, but was also actuated by legal malice, *i. e.*, by improper motive, being the determination to prolong its enjoyment of a profitable monopoly, without regard to the legal rights of others.

Held that defendant is liable for damages occasioned to plaintiff, not only by the unlawful issuance of the injunction, but also by the malicious prosecution of the suit.

In regard to the quantum and elements of damage, the contentions of defendant are considered and overruled and judgment affirmed.

APPEAL from the Civil District Court for the Parish of Orleans. *Rightor*, J.

E. H. McCaleb and *B. R. Forman* for Plaintiffs and Appellees:

1. One who has judicially admitted the legal existence of a corporation is estopped from pleading *nul tiel corporation*, when afterwards sued for damages on the injunction bond and for malicious prosecution. R. C. C. Art. 2291; 14 Ann. 308; 33 Ann. 732, 1444; 94 U. S. 104, 673.

2. A petition stating the name of a corporation and also the name of its president is in strict compliance with law. R. C. C. 439; C. P. 112, 198.

3. In an action for malicious prosecution, malice may be inferred from the want of probable cause. 33 Ann. 776; 9 R. 387, 418; 9 Ann. 219. Malice to support this action is any improper motive—it need not imply malignity. Drake on Attachment, § 733. *Probable cause* means reasonable grounds of belief, supported by circumstances sufficiently strong to warrant a cautious man in that belief. 33 Ann. 392.

4. As to the measure of damages, the true standard seems to be the expenses incurred and profits lost. 27 Ann. 191. In an action for malicious prosecution, where the jury gave the plaintiff £10,000, the court refused to interfere on account of the largeness of the verdict. 2 W. Bl. 1326.

5. Where the exclusive privilege conferred upon the Crescent City Slaughter-house Company had been upheld as a lawful exercise of the State's police power, (22 Ann. 545; 16 Wall. 36) and afterwards all monopolies were abolished by the Constitution of 1879, (Arts. 235, 248, 258), and the State Supreme Court had finally decided in a suit provoked by the said Slaughter-house Company that its exclusive privilege was not a contract and had been lawfully revoked (33 Ann. 934), and the then U. S. Circuit Judge (subsequently promoted to the bench of the U. S. Supreme Court) refused to interfere on an application for injunction made by the Slaughter-house Company, and where a suit involving the same questions between the same parties was pending in a State court of competent jurisdiction, the subsequent application for an injunction to the successor of the United States Circuit Judge by a citizen of Louisiana against a citizen of Louisiana, the prior application and the refusal thereof being concealed and suppressed—and the granting and maintaining of such an injunction under the pretext that the exclusive privilege of slaughtering animals was a vested right and contract protected by the Federal Constitution (111 U. S. 746), was a contempt of the State court where the question was pending, (20 Wall. 392; 16 Wall. 370), an illegal disregard of the final decision and judgment of the State Supreme Court previously rendered, (7 How. 624), and a trifling with courts which should not be countenanced or tolerated.

The opinion and decree of the United States Circuit Judge in such case (9 Federal Rep. 743), he having no jurisdiction whatever over the controversy, by reason of the citizenship of the parties, which decision was subsequently reversed by the United States Supreme Court, (111 U. S. 746) furnishes no excuse for such unnecessary and malicious suit, and cannot be invoked as constituting probable cause for the prosecution in answer to an action for the damages caused thereby.

6. In an action for malicious prosecution the defendant cannot justify by the advice of an attorney personally interested. 71 Maine 555; 36 Am. R. 353. Nor if he acted from motives of private interest, and without probable cause. 15 Ann. 672.

7. Where the whole case is before the Appellate Court, it will not pass on bills of exceptions taken to the refusal of the judge to charge the jury as requested. 23 Ann. 75; 21 Ann. 330; 22 Ann. 603.

8. Instructions requested which are mere hypothical propositions were properly refused. 2 Ann. 756.

9. The charge of the trial judge not having been reduced to writing, this Court will presume that he stated the law correctly to the jury. 7 N. S. 250. Appellant should have required his opinion in writing. C. P. 517; 5 R. 216.

White & Saunders and *Robert Mott* for Defendants and Appellants.

The opinion of the Court was delivered by

FENNER, J. This is an action by the plaintiff corporation to recover damages for injury sustained in consequence of the malicious prosecu-

tion of a civil suit against it by the defendant, and of the wrongful issuance of an injunction therein.

A *résumé* of the events preceding and attending the institution of the suit referred to, will facilitate the comprehension and disposition of the issues of law and fact involved.

By an act of the legislature, No. 118 of 1869, the State granted to the Crescent City Slaughter-house and Live Stock Landing Company a monopoly or exclusive right of carrying on the business of live stock landing and slaughtering within the parishes of Orleans, Jefferson and St. Bernard, for a period of twenty-five years.

The Constitutional Convention of 1879, revoked this grant, in so far as its exclusive or monopolistic features are concerned, by adopting Articles 248 and 258 of the present Constitution of the State.

Article 258 declared that "the monopoly features in the charter of any corporation now existing in this State" (with certain exceptions not pertinent to this case) "are hereby abolished."

Article 248 provided that "the police juries of the several parishes and the constituted authorities of all incorporated municipalities of the State shall alone have the power of regulating the slaughtering of cattle and other live-stock within their respective limits; provided, no monopoly or exclusive privilege shall exist in this State, nor such business be restricted to the land or houses of any individual or corporation; providing the ordinances designating the place for slaughtering shall obtain the concurrent approval of the Board of Health, or other sanitary organization."

If these provisions of the organic law of the State were valid, it is clear that the exclusive privilege granted to defendant by Act 118 of 1869, was swept out of existence; that the city of New Orleans had the undoubted right, with the approval of the Board of Health, to pass regulations and establish localities for the conduct of this business within her limits; and that any person complying with such regulations, would have the absolute right to establish and conduct the business within the limits fixed.

The only possible ground upon which the defendant corporation could oppose the right of the city to pass regulations and the right of persons complying therewith to carry on the business, lay in the denial of the validity of the constitutional provisions, because impairing the obligation of its contract embodied in Act 118 of 1869, and thus conflicting with the Constitution of the United States.

The questions involved were serious and important. Defendant's right to assert judicially the validity of his contract and to resist, by

all legal remedies, the execution of any State laws which impaired it, was unquestioned. The question involved was federal in its nature, and the courts of the State and, perhaps, of the United States were equally open to it for the vindication of its alleged right; and, in either forum, it was entitled to appeal to the Supreme Court of the United States for the final and conclusive settlement of the question.

Shortly after the adoption of the Constitution, certain butchers petitioned the council of the city of New Orleans to take action with regard to establishing limits and regulations for slaughtering. The matter was referred to the city attorney, who reported an opinion favorable to the validity of the constitutional provisions and to the right of the city to act in the premises.

Thereupon defendant conceived that the time had arrived for it to invoke the aid of the courts to protect its alleged contract rights. It then exercised its election as between the Federal and the State courts, and concluded to submit its claims primarily to the latter.

Accordingly, on February 5, 1880, it filed a petition in the Fifth District Court for the Parish of Orleans against the city of New Orleans, alleging that the latter had entertained the petition of the butchers and was about to designate places for slaughtering other than defendant's own slaughter-house; asserting its exclusive privilege under a contract protected by the Constitution of the United States; asserting the nullity of the provisions of the Constitution of the State in so far as they impaired or interfered with said contract and praying for an injunction, restraining the city "from ever designating a place or places for the landing, yarding, sheltering or slaughtering animals, etc., other than at the slaughter-house and premises of petitioner."

The city of New Orleans answered, substantially, setting up the provisions of the State Constitution as her warrant for the action which she was about to take in designating slaughtering places within her limits; asserting their validity and denying that they impaired any contract right of the petitioner which was protected by the Constitution of the United States.

The issue thus joined in a competent forum, of the company's own selection, passed regularly to trial and determination in the district court, was appealed to this Court, and after full hearing, in May, 1881, we rendered our opinion and decree, wherein we considered all the positions and arguments of the parties and held that Act No. 118 of 1869 did not create a contract protected from impairment by the Constitution of the United States, but that the rights therein granted, being

related to subjects affecting the public health, were revocable at the will of the sovereign; and we affirmed the judgment of the lower court which was in favor of the city and rejected the demand of the company.

It is important to estimate the scope and effect of this decision. It was an authoritative judicial determination, by a competent court, of questions submitted to it at the instance of the company itself. In denying the rights claimed by the company, and in affirming the right of the city to regulate slaughtering within her limits and to designate places for the conduct of such business, it necessarily affirmed the right of persons complying with such regulations to transact that business at such places and denied the right of this company to interfere with them. If there was error in the decision, that error could be corrected by one tribunal only, the Supreme Court of the United States. Until the questions involved had been determined differently by that high tribunal, the decision of this Court was entitled to be accepted as the law by this litigant.

Technical principles of *lis pendens* and *res judicata* might not debar the company from prosecuting another suit against a different party involving the same subject-matter; but if such suit rested exclusively upon the assertion of rights which this Court had directly determined that the company did not possess, it could find no protection against the charge of being a malicious prosecution save in the production of a decision of the Supreme Court of the United States holding that our opinion was error.

To proceed with the facts of this case: Shortly after the adoption of the Constitution, the plaintiff in the present case had been organized as a corporation for the purpose of conducting a slaughter-house business and, in anticipation of action by the city and Board of Health under Art. 248, had bought land and commenced the erection of buildings for the purpose.

On the 17th of November, 1881, the city council had passed certain ordinances designating places for the slaughtering of animals within the city limits, and including therein the point at which the Butchers' Union Company had located their building, and these ordinances were under consideration by the Board of Health, and actually received the approval of that body on November 25; but, anticipating the action of the Board of Health, on the 23d of November, the Crescent City Company filed in the U. S. Circuit Court a bill in equity against the Butchers' Union Company, wherein it set forth that the city council had passed the ordinances; that the Board of Health would approve

them; that "thereupon, the Butchers' Union Company, unless restrained therefrom by a writ of injunction, will proceed to construct and erect slaughter-houses, etc., and there conduct and carry on the business of live-stock landing, slaughtering, etc."

It thus alleged the existence of every condition essential, under the prior decision of this Court, to secure to the Butchers' Union Company and others the absolute right to prosecute the business without interference by the complainant, and then proceeded to propound the identical grounds which had been considered and overruled by this Court, and prayed for a writ of injunction restraining the Butchers' Union from proceeding with the construction and maintenance of buildings, etc, and from carrying on anywhere within the parishes of Orleans, Jefferson and St. Bernard, the business of stock landing and slaughtering, except at complainant's own premises.

The judges of the circuit court entertained the bill, granted a rule for injunction *pendente lite*, heard the parties, reviewed and reversed our opinion, issued the preliminary injunction, subsequently heard the cause on demurrer and pleas, and rendered a final decree perpetuating the injunction. This decree was carried by appeal to the Supreme Court of the United States, and in April, 1884, that Court reversed it, referring to and adopting the views which had been expressed by this Court in the case already referred to.

The present action, as already stated, is for recovery of damages sustained in consequence of the alleged malicious prosecution of the above suit and of the wrongful issuance of the injunction.

Was it a malicious prosecution?

To sustain this charge it is necessary to show: 1st. That the suit had terminated unfavorably to the prosecutor; 2d. That in bringing it, the prosecutor had acted without probable cause; 3d. That he was actuated by legal malice, *i. e.*, by improper or sinister motives.

The above three elements must concur.

The existence of the first is undisputed.

We are bound to hold that there was entire absence of probable cause. The suit involved absolutely nothing but questions of law.

Those identical questions had been submitted to this Court by this very prosecutor, in a case precisely analogous, and had been determined against him. It was thus authoritatively advised what the law was. If it was dissatisfied with the opinion, its remedy was clear by appeal to the United States Supreme Court, and it had actually availed itself of that remedy on writ of error which was pending and undetermined

when the suit was brought. It must be carefully observed that though the Butchers' Union Company was not technically a party to the suit against the city, the questions of right between it and the Crescent City Company were as directly involved as if it had been a party. If the city had the right to regulate slaughtering within her limits and to designate places for its lawful conduct, obviously persons complying with such regulations had the right to transact the business. If she had not that right, no person could lawfully slaughter elsewhere than at the old company's slaughter-house.

But it is claimed that the prosecutor acted under the advice of counsel learned in the law. That is certainly true, and would ordinarily protect. But, here, the client was in possession of the opinion of this Court on the very point in its own case, involving the same subject matter. It had no need for advice of counsel. That advice was simply that the opinion of this Court was error. Counsel had the undoubted right to entertain such opinion and so to advise its client; the only lawful remedy under such advice consisted in an appeal to the United States Supreme Court. If it chose to act otherwise on such advice, it acted at its peril and can take no protection therefrom. The only lawful action it could take under such advice had been already taken in the writ of error from the United States Supreme Court. Particularly does this apply here, when one of the counsel and the only one who testifies on the subject of advice, was himself a member and a director in the defendant company. We mention this with no intention to reflect upon the able and highly respected counsel, but simply to bring home to defendant the fullest knowledge and comprehension of the legal *status* of the case. Nor does the decision of the judges of the Circuit Court of the United States afford a better shield. They are not vested with authority to review or reverse the decisions of this Court. The effect of their action was, not only to overrule our opinion, but practically to reverse our decree. For of what avail was the right decreed by us in favor of the city, to regulate slaughtering and to designate places therefor, if persons complying with those regulations, could be enjoined by the United States Circuit Court from conducting the business at such places? It is obvious that the entire subject matter of the injunction suit was embraced in, and disposed of by, our decree; and that though the Butcher's Union Company, was not nominally a party, its rights and those of all persons to transact the business of slaughtering in this city, being subsidiary to, and springing directly from the right of the city, were necessarily involved in and protected by our decree.

With the utmost respect for the judges of the circuit court and without disputing their right to decide such questions according to their own views, we are bound to say that their proceedings in this suit are not in accord with the views often expressed by the Supreme Court of the United States, and carefully observed by us, touching the relations between the co-ordinate jurisdictions exercised by the Federal and State Courts.

We refer to Peck vs. Jenness, 7 How. 612; Taylor vs. Carryl, 20 How, 595; Taylor vs. Taintor, 16 Wall. 370; New Orleans vs. Steamship Co.. 20 Wall. 392; Memphis vs. Dean, 8 Wall. 64.

As evidence of the scrupulous respect which this Court observes towards the rightful jurisdiction of the circuit court, we refer to State ex rel. Newman vs. Burke, 35 Ann. 185. We make these remarks in no other spirit than from the desire to promote in future the observance (to use the language of the Supreme Court of the United States in Taylor vs. Carryl) "of such principles and methods of procedure as shall serve to conciliate the distinct and independent tribunals of the States and of the Union, so that they may co-operate as harmonious members of a judicial system co-extensive with the United States, and submitting to the paramount authority of the same constitution, laws and federal obligations."

But the ground on which we rest our conclusion on the question of probable cause is, that our decree in the suit to which the defendant corporation was a party was, until reversed, the law to it so far as the subject-matter thereof is concerned; that the prosecution of a suit which had no foundation except in the assumption that our decree was not law, was without probable cause; and that neither the advice of counsel nor the opinion of judges of a co-ordinate court that our decree was error, could furnish any cause whatever for the prosecution of such suit.

On the question of legal malice, the entire absence of probable cause is an important factor in its solution, but the record abundantly suggests and sustains the existence of the dominant motive which prompted the suit, viz: the desire and determination to maintain its enjoyment of a profitable monopoly and to prevent competition therein, regardless of questions of legal rights as expounded by the decree of this Court, and without awaiting the correction of any error which might exist therein by the only tribunal competent to do so. The force of this motive is apparent from the enormous profits and dividends earned and declared by the company; from the fact that the market value of its

stock rose between ten and fourteen dollars a share on the issuance of the injunction by the circuit court, and fell about as much when the United States Supreme Court reversed the decree; and that shortly after the latter decision the company reduced its tariff of charges by about twenty five *per cent.*

But the motive is rendered yet more apparent by the fact that, when the appeal from this Court was about to be reached on the docket of the United States Supreme Court, the company dismissed it, thus postponing the decision until the later appeal in the injunction case could be reached.

Such a motive constitutes legal malice and completes the elements necessary to sustain the charge of malicious prosecution.

We conclude that plaintiff is entitled to recover the damages occasioned to it either by the wrongful issuance of the injunction or by the malicious prosecution of the suit.

The effort of defendant to avert liability on the ground that plaintiff was already enjoined in other proceedings before the State courts, cannot avail, because under our decision in 33 Ann. 930, those injunctions could have been released on bond. It was only the injunction in the Federal court that placed it out of the power of the plaintiff to prosecute its enterprise. Nor is any inference hostile to plaintiff's claim to be drawn from its delay or failure to bond, because the federal suit rendered the bounding useless.

The estoppel opposed to plaintiff's claim as resulting from its judicial allegations in the suit against Howell et al., decided and reported in 37 Ann. 280, must be overruled. It is true that in the suit referred to, the plaintiff did allege that part of the damages now claimed resulted from the injunction issued in the suit of Howell vs. the Butchers' Union Company; but in the same suit defendant denied judicially that claim, on the ground of the pendency of its federal injunction. So that, on the question of estoppel the parties are equal, and, inasmuch as the defendant was the author of both injunctions, it cannot escape liability on such a plea.

We cannot sustain the contention of defendant that the damage to plaintiff's property had all occurred prior to the institution of the federal suit. No doubt some injury had resulted, but the building had not then fallen, and, but for the insurmountable obstacle opposed by that suit, it might have been saved and the disastrous sale averted.

The efforts of defendant to show that, in any event, the enterprise of plaintiff would have been abortive and that no profits would have accrued, are not sustained to our satisfaction by the evidence.

All these matters have been considered by the jury, and we are not disposed to disturb their verdict, which, though of considerable amount, is small in comparison with the profits derived by defendant from the illegal perpetuation of its monopoly during several years after it had been effectively destroyed by the organic law of the State.

On the whole, we think justice has been done.

Judgment affirmed.

No. 9328.

The Baltimore and Ohio Telegraph Company vs. Morgan's Louisiana and Texas Railroad and Steamship Company.

Where plaintiff and defendant are citizens of the same State, and the intervenor a citizen of another State, the latter cannot remove the cause pending in a State court to the Federal court, unless the controversy between him and the plaintiff can be fully determined in the absence of the defendant from the suit.

Where the law requires that the charter of a corporation must declare "the time when and the manner in which payments on stock subscribed shall be made," held that, where the charter declares "that the stock shall be paid in cash at such times and such amounts and with such notices to the subscribers as the managers and directors shall deem best for all parties in interest," it is a substantial compliance with the law. In an expropriation proceeding where the land sought to be expropriated extends through more than one judicial district, the suit must be brought in the district in which the owner has his domicile.

The map or plan required to accompany the petition for expropriation, which in connection with the petition gives intelligible information respecting the locus and condition of the land sought to be expropriated, complies with the legal requirements.

Where a proceeding for expropriation is directed against the owner of the soil to secure a sufficiency of land for a telegraph line, and a company intervenes and claims that the owner has already conveyed to it (the intervening company) the entire space for telegraph purposes sought to be expropriated for like purposes, but alleges no special injury to itself from the expropriation, or that the land occupied by it (the intervening company) is insufficient for both lines of telegraph, held that no cause is shown by the intervenor.

Where a telegraph company seeks to secure by an expropriation a sufficiency of the right of way of a railroad to construct its line of telegraph, and another telegraph company seeks to exclude the first company from such right of way of the railroad on the ground that it is entitled to the entire right of way under a contract with the railroad company, such a claim can only be urged on the theory that such opposing company possesses the exclusive right to the land against which the proceeding for expropriation is directed.

APPEAL from the Civil District Court for the Parish of Orleans. *Rightor*, J.

J. R. Beckwith for Plaintiff and Appellee:

1. In expropriation of land for works of public utility, the owner of the land is entitled to the value of the land actually taken, at the market value of the same area or acreage of land similarly situated in the same locality at *the time* the land is actually taken, without considering any enhanced value which will result from the contemplated improvement when completed.

2. If the *entire* tract belonging to a land owner is taken, the market value of the land at *the time of taking*, irrespective of the effect of the contemplated improvement on the price, is all the land holder can recover for *both land and damages*.
3. Where only a portion of an owner's land is taken, the owner is entitled to the *market value* of the land *actually taken*, not to be enhanced by the effect of the proposed improvement on the land taken or land in the vicinity, *and* such damages as the owner may suffer in addition of the actual value of the land taken, by reason of its expropriation. The jury must first ascertain the *actual market value* of the area of land *actually taken*, and then pass to the question whether the portion of the land of the land holder *not taken* is depreciated in value by the expropriation of the part taken.
4. That the true method of arriving at the damages to be paid *in addition* to actual value of the land is to first ascertain the value of the entire tract at the moment of taking, without taking into consideration any increase in value to flow from the *completed improvement*, and having ascertained that value at *that time*, then ascertain and determine the market value of the portion of the land *not taken* from the land holder by expropriation at its market value, *after the contemplated improvement is completed*, and the *difference* between the market value of the *entire tract before expropriation* and before the improvement, and the *market value which the portion of the tract not expropriated* will have *after* the contemplated improvement *is completed*, is the true measure of the amount of *damage* "beyond the actual value of the land taken," which should be awarded to the land holder as damages.
5. If the advantage which will result to the land holder from the improvement are greater than the damage which will result to him from the completed public improvement or work, the advantage must be set off against the disadvantage, and the land holder can recover nothing for damage "beyond the value of the land taken."
6. If the advantage resulting to the land holder is determined to be *less in money value* than fair compensation to the land holder for "damages beyond the value of the land taken," estimated in money, the ascertained advantages must be offset against the ascertained damages, *and only the difference* in the money estimate of damages and advantages can be allowed the land holder for "damages beyond the value of the land taken."
7. In estimating damage "beyond the value of the land taken," all damage in character "*damnum absque injuria*," or which the land holder suffers in common with others in the vicinity of the improvement, cannot be considered or allowed.
8. Loss of profit from new competitions in business, either caused or encouraged by the new public improvement contemplated, cannot be considered or allowed the land holder as damage resulting from the improvement. It is the duty of the law to encourage lawful competition in all lawful business and occupations.
9. In expropriation proceedings, the jury or commission can only allow as damage, "beyond the value of the land taken," such *direct and immediate* damage as directly affects and lessens the *value* of that portion of the land *not expropriated*, and tends to lessen its value, *as land*, below the market price which the same had before the improvement existed or was contemplated.

The preceding nine propositions are in accord with the following authorities: R. S sec. 701; New Orleans and Opelousas R. R. Co. vs. Lagard, 10 Ann. 158; Vicksburg and Shreveport R. R. Co. vs. Calderwood, 15 Ann. 481; New Orleans Pacific R. R. Co. vs. Gay, Tutor, 31 Ann. 431; Railroad Co. vs. Dillard, 35 Ann. 1005; Railroad Co. vs. Francis, 70 Ill. 238; Snyder vs. Railroad Co., 25 Wys. 60; Railroad Co. vs. Capps, 67 Ill. 607; Pierce on Railroads, 213; Schuylkill Navigation Co. vs. Farr, 4 Watts & S. 362; Rover on Railroads, 373, 383; Sutherland on Damages, 442; Troy and Boston R. R. Co. vs. Turnpike Co., 16 Bob. 100; Railroad Co. vs. Old Colony R. R. Co., 12 Cush (Mass); Ricket vs. Metropolitan R. R., 2d English and Irish Repeals (Law Reports) 175; Mills on Eminent Domain, par. 159, p. 194.

10. Section 698 R. S., in so far as it relates to the plan to be filed with the petition in expropriation proceedings, is directory, not mandatory. Remy vs. Municipality, No. 2, 12 Ann. 500.

11. The petitioner having filed a plan with his petition, his plan is simply in aid of the description of the land sought to be condemned. If the defendant asserts the plan to be incorrect, he should plead that both the plan and description in the petition are incorrect, and establish the correctness by affirmative proof. R. S. sec. 698.

12. If the description of the premises contained in the petition and plan described the property with sufficient certainty to make a good conveyance in a deed of conveyance, the statute is complied with. If the description is too faulty to designate the property sought to be expropriated, the owner should raise the issue when an entry is sought to be made after an expropriation. R. S. secs. 698, 699, 700.

13. The Statutes of Louisiana, relating to expropriation for works of public utility, relate only to the expropriation of private property and not property public in destination and character. R. S. secs. 696, 698, 700, Act No. 124, Acts of 1880; The Constitution of 1879, arts. 244, 237.

14. Under the provisions of the Constitution of 1879, and Act 124 of Acts of 1880, a corporation organized under the laws of Louisiana for the transmission of intelligence by telegraph or telephone for hire, has the right of entry on the unoccupied right of way of any railroad company in the State, subject to the conditions and restrictions of said Act 124, without resorting to expropriation, because the railroad is a public highway, as contemplated in Act 124 of 1880, Article 244 of the Constitution, there being no private property in the road. Railroad Co. vs. Casey, 26 Pa. St. 307; Trumick vs. Smith, 36 Pa. St. 18; notes to Dovaston vs. Payne.

Second, Smith's Leading cases: Peck vs. Smith, 1 Conn. 103, 132; Northern Central R. R. Co. vs. Commonwealth, 9 W. N. C. 130; New Orleans vs. Chattanooga R. R. Co., 27 Ann. —; Norwich Gaslight Co. vs. Norwich City Gas Co., 25 Conn. 19; Nicholson vs. Railroad Co., 22 Conn. 74; Dillon on Mun. Corp., par. 695, 3d ed; Logan & Son vs. Payne, 43 Iowa, 524; Chicago vs. Rumpf, 45 Ill. 90; State vs. Cincinnati Gaslight and Coke Co., 18 Ohio, St. 290, et seq; Messenger vs. Pennsylvania R. R. Co., 7 Vroom, 413; Marriott vs. London and Southwestern R. R. Co., 87 Eng. C. L. 498; Sanford vs. Railroad Co., 24 Pa. St. 378; Audendried vs. Railroad Co., 68 Pa. St. 379; Western Union Telegraph Co. vs. American Union Telegraph Co., 65 Ga. 160, 38 Am. Rep; Beekman vs. Saratoga R. R. Co., 22 Am. Dec. 679.

15. Article 364 C. P., and other provisions of the Code of Practice relating to the intervention of third persons, apply only to the ordinary actions authorized by the Code of Practice, and do not relate to or authorize intervention by third parties in special proceedings for expropriation of lands for works of public utility. The statutes relating to expropriation do not authorize or permit the intervention of third parties. C. P. art. 365.

16. A contract or convention between a railroad company and a telegraph company by which the two corporations sought to vest a telegraph company with an exclusive right to erect telegraph lines on the railroad right of way in the State of Louisiana and throw obstacles in the way of competition, is *ultra vires* the power of each of the corporations and void as *contra bonus mores* and contrary to public policy, and an illegal effort to place the control of a public highway beyond the reach of the State. Audendried vs. Philadelphia and Reading R. R. Co., 68 Pa. St. 379; Western Union Telegraph Co. vs. American Union Telegraph Co., 65 Ga. 160, 38 Am. Rep; Messenger vs. Pennsylvania R. R. Co., 7 Vroom, 413; Marriot vs. London and Southwestern R. R. Co., 87 Eng. C. L. 498; Sanford vs. Railroad Co., 24 Pa. St. 378; Southern and Atlantic Telegraph Co. vs. New Orleans, Mobile and Texas R. R. Co., 53 Ala. 211; Western Union Telegraph Co. vs. Pensacola Telegraph Co., 96 U. S. 1; Thomas vs. West Jersey R. R. Co., 9 W. N. C. 71; Railroad Co. vs. Davis, 43 N. Y. 137; Railroad Co. vs. Seeley, 45 Mo. 212; Redfield

on Railroads, Vol. I, p. 234, note 4, 5th ed; Addison on Contracts, par. 270-274; Lake on Contracts, 734; Addison on Contracts, par. 273; Atlantic and Pacific Telegraph Co. vs. Union Pacific R. R. Co., 1 McCreary, 541; Western Union Telegraph Co. vs. Wabash R. R. Co., 9 Biss. 72; Western Union Telegraph Co. vs. Burlington and Southwestern R. R. Co., 3 McCreary, 131; Thomas vs. West R. R. Co., 101 U. S. 71; American Union Telegraph Co. vs. Pacific R. R. Co., 1 McCreary, 188; Oregon, etc., vs. Winsor, 20 Wall. 66; Acts of New York, approved April 12, 1848, sec. 4, N. Y. Stat. at Large, Vol. III, 720, 2d ed; Railroad Co. vs. Davis, 43 N. Y. 137.

17. Neither the railroad company nor the Western Union Telegraph Company can object that Act 124 of 1880 is inoperative as to them, because passed subsequent to their pretended contract. 1st Redfield on Railroads, 5th ed. 651; Wynn vs. Railroad Co., 5 Exch. 420; Stevens vs. Railroad Co., 13 Beav. 48; Atkinson vs. Ritchie, 10 East. 530; Pollock on Contracts, Eng. ed. 340; Bailey vs. DeCrespigny, L. R. 4, Q. B. 180; Gaslight Co. vs. Middleton, 59 N. Y. 228; Brewster vs. Kitchen, 1 Salk. 198; Western Union Telegraph Co. vs. Atlantic and Pacific Telegraph Co., 5 Neb. 103; Pensacola Telegraph Co. vs. Western Union Telegraph Co., 96 U. S. 1; Western Union Telegraph Co. vs. American Union Telegraph Co., 19 Am. Law Reg. 173.

18. The jury impaneled in expropriation proceedings under the laws of the State, is a special commission composed of twelve commissioners required to possess peculiar qualifications and fitness, called into existence with special care to fitness, subject to challenge for cause in not possessing the statutory qualifications, and the court will not disturb the estimate of value of the property in damages made by the jury, except for reasons extraordinary in character, showing an erroneous application of the rule of damages. Railroad vs. Hart, 15 Ann. 507; 35 Ann. 1045.

19. The court should construe the laws for the encouragement of works of public utility with that liberal spirit necessary to make them effective to the end contemplated, and ought not to give sanction to or encourage unconscionable devices and obstructions thrown in the way of the enforcement of the statutes when inspired by the greed of rival corporations, acting through the possessor of the land sought to be expropriated, under compulsion of dishonest and fraudulent stipulations of contracts seeking to throttle competition and give a monopoly.

Leovy & Leovy and *J. P. Blair* for Defendant and Appellant:

1. Section 683 of the Revised Statutes requires that the charter of a corporation shall contain a statement of the amount of capital stock, the number of shares, the amount of each share, the *time* when and the *manner* in which payment in stock subscribed shall be made. A proviso in a charter that payment shall be made "at such times and in such amounts and with such notices to the subscribers as the manager and directors of said corporation, or a majority thereof, shall deem for the best of all parties in interest," is not a compliance with the statute. The *charter* does not fix *time* or *manner*, but relegates this duty to the officers of the company, and the public is unprovided with the information which it was the object of the charter to give.

2. A jury of freeholders, impaneled in the parish of Orleans, cannot, in an expropriation case, assess the value of lands and improvements in a distant parish. The Act of 1880 (p. 170) requires the suit for such purpose to be instituted before the judge of *the* district court where the land is situated, or if the land extends into *two* districts, in either of the *two*. And Section 700 of the Revised Statutes (which is not amended by the Act of 1880) requires "that the case shall be tried before a jury of freeholders, *residents of the parish* in which the land lies."

3. The Constitution provides that vested rights shall not be divested, unless for purposes of public utility and for "*adequate* compensation;" and the Revised Statutes (Sec. 700) and the Act of 1880 (p. 171) provide that in case of expropriation, the owner of the prop-

erty expropriated shall be paid the land "with *its improvements*," and such "damages" besides as the owner may sustain. Under these provisions of the law, the owner of the land expropriated for telegraph or railroad purposes is entitled to payment of the value of the property as improved and fitted by him for such purposes. Mills on Eminent Domain, sec. 173; Rorer on Railroads, p. 853; 35 Ann. 1045; 1 Redfield on Railroads, secs. 71, 74; Louisiana Cons., Arts. 155, 156; 98 U. S. S. C. 453.

Bayne & Denègre and *G. B. Clark* for Intervenor.

The opinion of the Court was delivered by

TODD, J. This is a proceeding instituted by the plaintiff corporation to expropriate land occupied by the defendant railroad company, as its right of way for the purpose of establishing and constructing its line of telegraph from the city of New Orleans to Lafayette.

The Western Union Telegraph Company intervened in the suit, claiming a right to the use of this roadway and possession of the same for its own telegraph purposes, under a contract with the railroad company defendant, and praying for damages against the plaintiff company, should it succeed in obtaining the expropriation asked for in this suit.

From a judgment in favor of the plaintiff and against the defendant and intervenor, the two latter have appealed.

1st. We will first direct our attention to the motion to remove the cause to the Federal Courts made by the Western Union Telegraph Company, so soon as its intervention was filed and allowed.

This company (the intervenor) was chartered by the State of New York, where it has its domicile. The plaintiff and defendant companies are domiciliated in this State.

This application for removal was made under the alleged authority of the second section of the Act of Congress of the 3d of March, 1875, conferring upon the Federal Courts jurisdiction in certain cases therein enumerated.

An analysis of this section shows, that it consists of two clauses, and that by the first clause removal is allowed only in the following cases:

1st. The amount in dispute must exceed $500, and must arise under the Constitution and laws of the United States or treaties made or which shall be made under their authority.

2d. Or a suit at which the United States shall be plaintiff.

3d. Or one between citizens of the same State, claiming lands under grants of different States.

4th. Or a suit between citizens of a State and foreign States, or the citizens or subjects of foreign States.

5th. Or a suit in which there shall be a controversy between citizens of different States.

It is evident that the removal in the instant case could not be allowed unless under the provision last cited, but the second clause of this section prescribes not only that the controversy must be wholly between citizens of different States, but must be one which *can be fully determined between them without the presence of the other parties to the record.*

Now, this proceeding was resorted to by the plaintiff for one specific purpose: that is to have condemned for its use enough of the right of way of the railroad company, for the erection and maintenance of a line of telegraph from the points designated.

Both plaintiff and defendant are citizens of Louisiana. The intervenor, a citizen of New York, asserts a similar right on the property of the company to that asked by the plaintiff, as already obtained by contract, and a right conflicting with and excluding the claim made by the plaintiff.

It is difficult to see how the claim of the plaintiff against the railroad company and the right of the intervenor upon the property of the same company, and the respective and conflicting claims of the plaintiff and intervenor could be determined in the absence of the railroad company, whose property forms the very corpus or subject matter of the controversy.

There is, however, one feature of the case presented by the record that places this matter beyond doubt.

The intervenor, (Western Union Telegraph Co.,) though asserting an exclusive right in itself over the road-bed for telegraph purposes, does not pray for a decree recognizing such right in its favor, and rejecting by reason thereof the adverse claim of the plaintiff, but merely asks that, in the event the plaintiff company obtains a decree ordering the expropriation sued for, then and in such case the intervening company recover of the plaintiff company the value of the land expropriated. That is, the only relief asked for by the Western Union Telegraph Company is predicated and contingent upon the judgment that may be rendered in favor of the Baltimore and Ohio Telegraph Company (plaintiff) against the railroad company, defendant, which judgment can only be rendered, if rendered at all, in the State Court, since the controversy as between the latter two companies—citizens of the same State—is one confessedly non-removable.

We are therefore clearly of opinion that the motion to remand was properly overruled. See Hyde vs. Ruble, 104 U. S. 407; Corbin vs.

Van Brunt, 105 U. S. 576; Fraser vs. Johnson, 106 U. S. 191: Memphis and Charleston R. R. Co. vs. Alabama, 107 U. S. 581.

II.

A number of exceptions were filed by the defendant to the plaintiff's proceeding; among them we find:

1. One denying or questioning the validity of the charter of the plaintiff Baltimore and Ohio Telegraph Company (plaintiff) on the ground that a law of the State (Sec. 685, R. S.) required that the charter of a corporation must declare among other things "the time when and the manner in which payment on stock subscribed shall be made;" and that the charter, in this instance, only prescribes that the capital stock "shall be paid in cash, at such times and in such amounts, and with such notices to the subscribers, as the managers and directors of said corporation, or a majority thereof, shall deem for the best of all parties in interest."

We think this clause in the charter is a substantial compliance with the law.

The subscription fixed the amount of the stock subscribed, and the liability therefor. The stock is to be paid for by the terms of the charter in installments, as ordered by the managers and directors, and in cash after ten days' notice. This seems sufficiently definite and certain; and in this opinion we are confirmed by the legislative construction given this clause of the statute by a number of charters granted from time to time to various corporations by the legislature. Among others we find that the charter to the company defendant in this case, and which sets up this plea—the Morgan's Louisiana and Texas Railroad Company—contains almost the identical words on this point that the charter of the plaintiff company—the language being as follows:

"The time and manner of payment for stock shall be such as may be determined by the board of directors." Sec. 10, Act 37 of 1877.

The same language may be found in Act 97 of 1877, incorporating the Barataria Ship Canal Company, Sec. 4; and also in the charter of the New Orleans and Jackson R. R. Co., Act 1853, p. 109, and in that of the Mississippi and Lafourche R. R. Co., Act 103 of 1855, and in several other legislative charters unnecessary to enumerate.

2. Another exception was to the effect that "the map or plan filed together with the petition was not such a plan of the right of way as the law required."

We have attentively examined both the petition and the map annexed thereto, and when we consider that the purpose of the proceed-

ing was to obtain an expropriation of land along the line of a railroad long established and well known and defined, sufficient to erect telegraph poles, and further consider that the reason of this requirement was simply to give intelligible information as to the situation or locus of the land wanted and its condition, it is too clear for argument that the description in the petition and delineations in the accompanying map fulfilled completely all legal requirements. There was no possibility of mistake as to what was sought by the suit.

3. Another exception to the plaintiff's suit was:

That the jury impanneled to value the property sought to be expropriated, is from the parish of Orleans and is called upon to value property situated out of said parish.

Section 698 of the Revised Statutes prescribes that in cases of expropriation, the party seeking the appropriation must apply to the judge of the district in which the land may be situated, or if it extends into two districts, to the judge of the district in which the owner resides.

The owner of the Morgan Railroad is the defendant corporation, having its domicile in the parish of Orleans. The land sought to be expropriated extended into two or more districts. The charter of the company moreover provides that it must be sued in the parish of Orleans, that is at its domicile. Therefore the institution of the proceeding in question before the Civil District Court for the parish of Orleans was compulsory, since no other court, under the law referred to, had jurisdiction of the matter.

This law further provides that the judge shall indorse on the petition presented an order directing the clerk to give notice to the owner of the land sought to be expropriated, and that immediately after this order shall have been made by the judge, the clerk and sheriff shall make a list of forty-eight free holders, residents of the parish where the land lies, out of which number shall be drawn the jury to determine the value of the land.

Now it is evident if the court of the domicile of the owner has sole and exclusive jurisdiction of the suit, the officers of that court, the clerk and sheriff, could not go outside of that jurisdiction to select a list of jurors to sit in the case: they, of course, must be confined in their selection to jurors resident of the parish where the suit was brought.

The judge himself would be powerless to direct the drawing or selection of jurors in other parishes beyond his jurisdiction. Therefore to give any effect to the law providing for a proceeding of this kind, it

was absolutely necessary that the jury should be drawn from the parish or parishes within the jurisdiction of the court before which the suit was pending. If any attempt had been made to institute separate proceedings in each of the parishes over which the land extended, it is evident that such attempt would or could have been defeated by a plea to the jurisdiction, since no other court, in such case, could entertain the application under the positive provisions of the law save the court of the domicile of the owner, which, in this instance, was the Civil District Court of the parish of Orleans, and in which parish, it is conceded, that the land in part was situated. This conclusion is irresistible when we consider the several sections of the statute, guided by that rule of construction which seeks to harmonize the apparently conflicting parts in order to render it effective as a whole.

There were other exceptions made, which are not seriously pressed before this Court and which, in our opinion, are without force. The exceptions were all properly overruled.

III.

The only remaining contention on the part of the defendant is, that the compensation allowed for the land expropriated was wholly inadequate. We have carefully weighed the testimony on this point, which to some extent is conflicting, but when we consider the small quantity of land required for the erection of the poles and the construction of the telegraph line, and the use of which cannot possibly interfere with or obstruct in the least the right of way of the railroad company or impair in any manner the operation of its line, we are not disposed to disturb the estimate of the jury, which was fixed by their verdict at two thousand one hundred dollars.

IV.

THE INTERVENTION.

As before stated, the object of the intervention of the Western Union Telegraph Company was to recover from the plaintiff company a sum equal to the amount that might be assessed by the jury as the value of the land expropriated in the event of a judgment decreeing the expropriation. This demand was founded on a contract between the intervenor and the Morgan Railroad Company, in which the exclusive use for telegraph purposes was granted by said company.

This contract was offered in evidence both by the Western Union and the Morgan Company. By the first not for the purpose, as stated in the bill of exceptions, "of establishing any exclusive use of the right of way for its line of telegraph," "which would interfere with

the State's right of eminent domain," "but for the purpose of showing the usufruct and base of said right of way granted to the intervenor," and by the defendant company it was offered with a view of showing the value of the land sought to be expropriated by the plaintiff.

The court properly sustained the objection of the plaintiff's counsel to the admission of the contract for the purpose for which it was offered by the defendant, since plaintiff was no party to that contract and the consideration given by the Western Union, purporting to be for the exclusive use of the entire right of way for its line, was no criterion of the value of the modicum of the land sought to be obtained by the plaintiff for its purposes.

The court, however, erred we think in rejecting the contract on the objections made when offered in evidence by the intervenor.

The main objection was, that the grant of the exclusive use of the right of way for telegraph purpose to the intervenor, was contrary to law and public policy, and rendered the contract void. This plainly went to the effect of the contract or the evidence, and so in fact did every other objection made and noted in the bill.

We find the contract in the record and shall treat it as properly before us.

It is plain that the claim of the intervenor to recover of the plaintiff whatever sum the jury might fix upon as the value of the land expropriated for the use of the Baltimore and Ohio Telegraph Company, can rest alone on the theory of an exclusive grant to the intervening company under its contract with the Morgan's Railroad Company. In the petition of intervention there is no special damage alleged as resulting from the expropriation or the use of the land to be expropriated by the plaintiff.

It is not charged that such use by the plaintiff will interfere with or obstruct the operation of the intervenor's line, or that the right of way of the railroad company is not sufficient for the working of both lines of telegraph; and leaving out the question of the exclusive grant to the Western Union Company—which the contract with the railroad company plainly purports to convey—it would seem clear that the petition of intervention on the very face of it sets forth no cause of action.

Inasmuch, therefore, as the intervenor asks for no judgment against the plaintiff decreeing or recognizing its exclusive use for telegraph purposes of this right of way of the roilroad, but, on the contrary, expressly declines in the petition to press such a claim and disclaims any purpose or intention to assert any such exclusive right under the

contract, and moreover, as we are fully satisfied that no damage could result to the intervening company by the mere construction of plaintiff's line of telegraph,—we think, therefore, for these reasons alone, we are justified in rejecting the intervention, without discussing and determining the effect of this exclusive grant contained in the contract and deciding whether it was legal or illegal, valid or void, a point upon which a lengthy argument has been submitted to us by the plaintiff's counsel.

Nevertheless the question naturally suggests itself as to which company—the railroad company or the Western Union Telegraph Company—should receive the sum awarded by the jury as the value of the expropriations, and which sum was paid into court by the plaintiff. This question, however, we cannot now determine, since there is no issue raised in the pleadings between these two last named companies, touching their respective claims thereto. We have only decided that the plaintiff was legally entitled to the expropriation, and must pay, therefore, the sum fixed by the verdict of the jury. The rights of the intervening and defendant companies not being put at issue, nor passed upon with respect to this fund are of course reserved.

Judgment affirmed.

On Application for Rehearing.

Manning, J. The application for rehearing complains of the insufficiency of the sum allowed as damages, and the reservation of the intervenor's right to a part of that sum.

We are not disposed to alter the sum assessed by the jury, and our remarks in the concluding paragraph of the Opinion were not intended as a suggestion to the intervenor to institute a new suit, nor to deprive the defendant of receiving the money adjudged to be due it under the terms of the judgment. We simply meant to say that if the intervenor has a just claim to any part of the money awarded as damages, it is not concluded from advancing and pressing such claim against the defendant, but the judgment of the lower court was in favor of the defendant against the plaintiff for the damages and we affirmed it, and therefore the defendant has a present right to that sum according to the terms expressed in the judgment.

Rehearing Refused.

No. 9446.

THE STATE EX REL. BOARD OF HEALTH VS. CITY OF NEW ORLEANS ET ALS.

The charter of New Orleans empowers her Council to fix the compensation of every officer of her own or of the State whose salaries are to be paid by herself, and to prescribe the number of such officers.

The exercise by the Board of Health of the power to appoint sanitary inspectors and police men at salaries larger than the appropriation made by the City Council will warrant, and to require the City to pay them, is inconsistent with and in derogation of the City's right to fix the compensation of all officers that are to be paid by her.

Discretion is lodged in the Council as to the amount of the appropriation to be annually made for the Board of Health and the Board has no control over it. It can expend that and no more.

APPEAL from the Civil District Court for the Parish of Orleans. *Lazarus*, J.

M. J. Cunningham, Attorney General, and *F. C. Zacharie* for the Relators, Appellants.

W. H. Rogers, City Attorney, and *Branch K. Miller*, Assistant City Attorney, for Respondents, Appellees.

The opinion of the Court was delivered by

MANNING, J. This is an application by the Board of Health of the State for a mandamus against the City and its officers to carry on its police roll six sanitary policemen employed by the relator and to pay their salaries out of the general appropriation for police in the City budget.

The budget for 1884 contains an appropriation of six thousand dollars for the Board of Health. An Act of 1870 authorizes the Board to appoint sanitary inspectors and the salaries of these inspectors have consumed this appropriation. The same Act confers upon the Board the control of the sanitary police, Acts 1870 ex. sess. p. 55, and it is to compel the City to pay the salaries of these latter in addition to those of the inspectors that this mandamus is invoked.

The City charter empowers her council to fix the compensation of every officer of her own or of the State whose salaries are to be paid by herself and to prescribe the number of them. Acts 1882, p. 31. When she appropriated six thousand dollars to the Board of Health for all purposes it was tantamount to fixing the salaries of these ser-

vants of the Board at that sum, leaving to the Board to apportion it among them. It might well have been supposed that the Board was the best judge of the nature and extent of the duties of these servants and could best apportion to each or to each class the compensation that each ought to receive, the Council contenting itself with fixing the sum in bulk and leaving its distribution to the Board.

The exercise by the Board of the power to appoint sanitary inspectors and policemen at the minimum salaries, and to require the City to pay them regardless of a fixed appropriation made by herself and outside of it, is inconsistent with her right to fix the compensation of all officers who are to be paid by her and is in palpable derogation of that right.

The relators rely on the Act of 1877 but that Act, in empowering the Board to protect the health of the City, restricted its authority to incur expense to the assent and concurrence of the Council, and made it the duty of the Board to report to the Council annually an estimate of the probable sum required to meet its expenses, and then obliged the Council after considering that report to make such appropriation as by it may be deemed necessary. Acts 1877, p. 118. Discretion was lodged in the Council as to the sum and the Board had no control over it. It could not be otherwise, for in no other way could the Council protect its revenues.

The lower court refused to make the mandamus peremptory and dismissed the relator with costs.

Judgment affirmed.

Rehearing refused.

DISSENTING OPINION.

FENNER, J. Without entering into questions as to the power of the City Council to limit and fix the appropriation for expenses of the Board of Health, including the compensation of sanitary inspectors and expense of sanitary police, I am clearly of opinion that the appropriation on the budget for 1884 was actually made for expenses other than that of the police, and, having been so made, the council had no power, by subsequent resolution, to divert the amount so budgeted to the payment of the sanitary police, which the law required the city to furnish and which had always been detailed from the police force and paid from the police appropriation.

For these reasons I dissent from the decree herein.

No. 9521.

THE STATE OF LOUISIANA VS. ROBERT JACKSON.

Evidence of violent and dangerous character of deceased, in a murder case, is inadmissible unless supported by the foundation of proof of assault or hostile demonstration at the time of the killing.

Where the judge states as his reason for excluding such evidence that the proof did not establish such foundation, we cannot reverse his ruling.

APPEAL from the Eighth District Court, Parish of Madison. *Deloney*, J.

Jos. E. Ransdell, District Attorney, for the State, Appellee.

J. B. Stone for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. The only error claimed appears on a bill of exception taken to the ruling of the court excluding evidence as to the dangerous character of the deceased. The bill contains averments going to show a hostile demonstration or assault by the deceased, which might have supported the introduction of the evidence; but the State objected "on the ground that no assault had been established and that two witnesses for the State had previously sworn that deceased was walking quietly along, no pistol being drawn or demonstration made, and that defendant's witness did not state accused went towards him drawing a pistol."

The judge having before him the two statements of accused and of counsel for the State, gives as his reason for excluding the evidence, "that an assault was not sufficiently shown."

It is elementary that evidence of dangerous character of the deceased is inadmissible, unless the foundation has been laid by proof of some assault or hostile demonstration on the immediate occasion of the killing. State vs. Jackson, 33 Ann. 1087; State vs. Claude, 35 Ann. 71.

The judge must determine whether such foundation has been laid, and when his statement shows that the proof did not sustain it, we are bound to accept it. State vs. Ford, 37 Ann. 443; State vs. Janvier, 37 Ann., not yet published.

Under this view we cannot reverse the ruling.

Judgment affirmed.

No. 9520.

THE STATE OF LOUISIANA VS. SPENCER JACKSON.

An accused cannot accept a juryman when he has good cause of challenge, take the chances of a verdict in his favour, and when disappointed present the objection in a motion of arrest of judgment. Much more is he forbidden to make the objection after conviction when, having been informed of it in open court by the juryman himself, he consents that the latter shall sit. The disqualification being such that the prisoner could waive it.

APPEAL from the Sixteenth District Court Parish of East Feliciana. *Kernan*, J.

M. J. Cunningham, Attorney Geneneral, for the State, Appellee.

Kilbourne & Wedge, for Defendant and Appellant.

The opinion of the Court was delivered by

MANNING, J. From a conviction of perjury and sentence thereon to five years' hard labour the defendant appeals and relies for reversal upon a motion in arrest of judgment based on two grounds;—

1. "That the jury was biased and prejudiced, one of its members having been on the grand jury that prior to the filing of the information had investigated the case, which defect cannot be waived."

After the jury had been sworn and empanelled, one of them informed the court that he was on the grand jury that found an indictment against the defendant charging him with perjury in this same matter but had no recollection of the circumstances. Thereupon the district-attorney and the counsel for the defendant consented that he should remain on the petit jury and the trial proceeded.

The juryman must have been mistaken about the grand jury finding an indictment as the proceeding before us is an information, unless an indictment was found and withdrawn and this information was afterwards filed. However that may be, it is settled that such objection must have been made when the juryman was offered. An accused cannot accept a juryman when he has good cause of challenge, take the chances of a verdict in his favour, and when disappointed take shelter under the objection that he has refused to avail himself of. State v. Alvarez, 7 Ann. 284; State v. Jackson, 25 Ann. 537; State v. Harris, 30 Ann. 90.

Much more is he forbidden to make the objection after conviction when, having been informed of it in open court by the juryman him-

self, he consents that the latter shall sit. The disqualification was not such that the prisoner could not waive it.

2. "That the information is defective in not stating the time place and circumstances of the perjury."

This is not well founded. The information sets out the circumstances with minuteness and expressly states the time and place when and where the perjury was committed.

Judgment affirmed.

No. 9506.

THE STATE EX REL. JAMES DAVID VS. THE JUDGES OF THE COURT OF APPEALS OF THE FIFTH CIRCUIT.

It is only where the legality of a tax is at issue, that is, where a tax is charged as being unauthorized by law, or being authorized, that the law itself is unconstitutional, that the Supreme Court has exclusive appellate jurisdiction.

From the fact that an assessment is erroneous and that a sale of the property assessed is a nullity for some error, it does not follow that the tax, to pay which the sale was made, is in itself illegal. An issue on those questions does not involve the legality of the tax.

A circuit court has appellate jurisdiction over such a cause which does not come within that of this Court, where the matter in dispute does not exceed two thousand dollars.

In such a case, a prohibition does not lie to the circuit court.

APPLICATION for Prohibition.

R. McCulloh and *Pugh & Folse* for the Relator.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an application for a prohibition to arrest the execution of a judgment of the circuit court. It is based on the ground of absence of jurisdiction *rationae materiæ*. The prayer is also that an order be made for the transmission to this Court of the proceedings below, that their validity may be ascertained.

It is urged by the relator that the matter at issue in the controversy is the legality of a tax, and that the determination of such a question appertains exclusively to this Court.

From the averments it appears that the suit referred to is one in which the plaintiff claims the ownership of certain real estate.

Averring apprehensions of disturbance and molestation by a party pretending to have acquired the same from the State, to whom it had been adjudicated at a tax sale, which is charged with nullity, in consequence of illegal assessments,—the plaintiff obtained an injunction to quiet him in his possession and enjoyment.

After issue joined, the district court perpetuated the injunction.

On appeal the circuit court reversed that judgment and remanded the cause.

A first petition for a rehearing having been refused, the appellee moved for another, on the new ground of want of jurisdiction, the matter involved being the legality of the tax, over which the Supreme Court alone has jurisdiction.

The circuit court overruled the second application and maintained its jurisdiction.

The case presented involved merely the validity of an adjudication to the State of property offered for sale for non-payment of taxes, and that of a sale of the property by the State to the defendant in injunction.

There is not the slightest reference to the *tax* for the payment of which the property was seized, and still less is any averment made that it is illegal or unconstitutional.

The contention was that, as the property had been illegally assessed, the adjudication to the State and the sale by her are nullities; that the plaintiff was never expropriated and that he must be quieted in his possession and enjoyment.

The complaint made in the second application for a rehearing and in the petition for relief in this court, is that the tax to pay which the property was seized is illegal only because the property was improperly assessed.

There never was an issue between the State or the parish and the relator as to the legality or illegality of the tax, and it is only in such cases that an appeal lies to this Court regardless of amount.

It may be that the assessment was illegal and that consequently the adjudication and the sale attacked are nullities; but that circumstance does not justify the conclusion that thetax is illegal and unconstitutional, so as to give to this Court jurisdiction over the injunction suit which involves, after all, only a question of title.

A tax is deemed illegal only where there is no law to authorize the levying of it, or, where there being such law, that law is unconstitutional and so void. An erroneous assessment does not make a tax illegal. A tax may be legal or constitutional, though the assessment be defective. 32 Ann. 817; 33 Ann. 286; 36 Ann. 286, 364, 801; 37 Ann. 507.

It is in such cases only that this Court has exclusive appellate jurisdiction, regardless of amount.

As in Block vs. Fontenot, 35 Ann. 965, it may well in the present controversy be observed that the "pleadings in the injunction suit do not present the question of the legality or constitutionality of any tax, under the assessment complained of. That branch of our jurisdiction has therefore no application to this case, and our jurisdiction must in consequence be tested by the amount in dispute." See also 11 Ann. 743; 2 Ann. 538; 4 Ann. 13; 5 Ann. 880; 3 Ann. 693; 9 Ann. 645, 305, 350; 10 Ann. 724.

It does not appear that the property in question exceeds in value $2000.

The circuit court properly maintained its jurisdiction, and no prohibition can issue to prevent the execution of its judgment.

Application refused.

Rehearing refused.

No. 9334.

D. M. GIDDENS, EXECUTOR vs. MADISON MOBLEY ET ALS.—JOHN CHAFFE & SONS INTERVENORS.

All persons who have an interest in acquiring an estate by prescription have a right to make the plea, even though they from whom they derive title should renounce it.

One not a party to a suit as defendant, whose interest is threatened or attacked by a plaintiff, may intervene and plead prescription.

If a defendant, who has pleaded prescription in the court below, withdraws his plea in the Supreme Court and prays an affirmance of the judgment which was against him, and an intervenor who has acquired that defendant's rights has pleaded or then pleads prescription, his plea will be maintained if it appear that the defendant's plea would have been maintained.

APPEAL from the Fourth District Court Parish of Red River. *Logan*, J.

M. S. Jones and *J. D. Roach*, and *Kennard, Howe & Prentiss* for Plaintiff and Appellant.

L. B. Watkins, S. A. Hull and *J. F. Pierson* for Defendants and Appellees.

ON REHEARING AS TO SOME OF THE DEFENDANTS AND THE INTERVENORS.

The opinion of the Court was delivered by

MANNING, J. The facts of this case are stated in our opinion on the first hearing. Giddens v. Mobley, 37 Ann. 417. For reasons given on the application for rehearing we adhered to our original opinion as to all the defendants except those therein mentioned and granted the re-

hearing as to them. We granted it to the intervenors of our own motion and for their protection. There remains for examination these matters alone.

Larkin Edwards had not answered nor pleaded prescription. That part of the land which was claimed by him is embraced in the Rees part of the tract. While Rees was owner of it he mortgaged it to P. S. Wiltz in May 1879 and this is the mortgage acquired by John Chaffe & Sons. Larkin Edwards bought his part after that mortgage had been placed on it and of course burdened by it. The mortgage contained the fact *de non alienando*. When the Chaffes foreclosed and bought the whole land covered by their mortgage, they acquired Larkin Edwards' part, and they have pleaded the prescription of ten years. They can plead it. All persons who have an interest in acquiring an estate by prescription have a right to make the plea even though they from whom they derive title should renounce it. art. 3466 Rev. Civ. Code. Blanchard v. Decuir, 8 Ann. 504. And an intervenor whose interest is to defeat the plaintiff's claim may plead it as well as a defendant. Canal Bank v. Beard, 16 Ann. 345. And as we have maintained that plea as to other defendants, the maintenance of it now for the intervenors assures to them the land embraced in their title.

B. F. Jones' succession did answer and pleaded prescription, but the plaintiffs insisted that the lands claimed by that succession are not all included in the tax-deed. Then our decree will not affect those outside of it. The plaintiff's suit had for its object the annulment of a tax-sale, and could therefore have no relation to lands not sold for taxes nor claimed in their petition, and our decree could go no further than the demand.

Madison Mobley and T. H. Hamilton were two of the purchasers at the tax-sale and pleaded prescription in the lower court, but in this court they withdrew their plea and prayed the affirmance of the judgment below. They had sold their lands and had been paid, but the lands thus sold by them came into Rees' possession and were a part of those mortgaged by him and ultimately bought by the intervenors, whose plea of prescription protects them and prevents the success of that arrangement whereby these two defendants were to pocket their gains to the detriment of the intervenors.

Mrs. Lisso was not represented by Messieurs Watkins and Hull but by J. F. Pierson Esq. who pleaded prescription for her, and as this plea was sustained by us she is protected by it. Therefore

It is ordered and decreed that our first decree reversing the judgment of the lower court and giving judgment in favor of these defendants sustaining their plea of prescription and quieting them in possession and ownership of the land and against the plaintiff for their costs in both courts is adhered to and maintained. And it is further ordered and decreed that our first judgment dismissing the interventions at the cost of the intervenors is avoided and set aside, and that said intervenors now have judgment against the plaintiff sustaining their plea of prescription of ten years and quieting them in the possession and ownership of the land described in their deed, and for their costs in both courts.

No. 9517.

C. V. THIBAUT, SHERIFF, AND EX OFFICIO TAX COLLECTOR, VS. JOSEPH DYMOND.

A sugar planter who keeps a store on his plantation must pay a license as retail dealer, where, though the bulk of the sales are made to employees on the plantation, yet other persons are not forbidden to purchase from the store.

Nor is there any legal authority for graduating such license by the amount of sales made to the public, *i. e.* to persons not employed on the plantation.

APPEAL from the Twenty-fourth District Court, Parish of Plaquemines. *Livaudais*, J.

Robt. Hingle and *Jas. Wilkinson* for Plaintiff and Appellee.

E. H. McCaleb for Defendant and Appellant.

The opinion of the Court was delivered by

TODD, J. This is a proceeding by rule, instituted by the sheriff and tax collector of the parish of Plaquemines to recover the amount of the State and parish license of the defendant as a retail grocer and liquor dealer in said parish.

The payment of the license is resisted on the ground that the defendant is a planter and manufacturer of sugar, and that he keeps a store on his plantation in which he sells to his laborers and employees alone only such provisions, goods, etc., as they require, not as a retail merchant does, exclusively for profit, but as an advance on their wages and as an incident to his main business; and that the license tax sought to be exacted of him is therefore illegal and void.

There was judgment for the plaintiff, and the defendant has appealed.

The evidence shows that the defendant is a sugar planter, employing at times on his plantation as many as 300 laborers.

That he has a store on his plantation, from which are sold goods, groceries, etc., to the amount of $25,000 annually.

That he sells malt liquors in quantity not less than a pint, and which is drank at the counter.

That the bulk of his sales are to his employees, but that others than these, wishing to purchase at the store, are not refused. That the sales to the latter do not exceed $500 annually.

We think these facts bring the case within the provisions of Act 4, Extra Session of 1881—the present license law—which, among its other provisions, imposes a license as follows:

"That for every business of selling at retail, whether as principal or agent, or on commission, or otherwise, the license shall be based on the gross amount of sales, as follows: ..... Twentieth Class: When the gross sales are $25,000 or more, and under $30,000, the license shall be twenty-five dollars." Sec. 6.

It is further provided in the same act and section that when liquors of any kind are sold in connection with the business, in quantities not less than one pint and more than five gallons, the license shall be double the foregoing.

We are referred to the case of Luling vs. Labranche, 30 Ann. 972, as sustaining the pretensions of the defendant. That decision was rendered before the statute referred to was passed; and besides, the facts of the two cases are not identical, since in the one referred to sales were made exclusively to the employees.

Lastly, it is urged that the license should be graduated, not by the total amount of the sales but by the amount of sales to the public, *i. e.*, to persons not employed on the plantation.

Granting that the law as it now stands would not justify the exaction of a license where sales from a plantation store were confined strictly to the laborers on the place, still where this restriction is not observed, but the store is open to the patronage of the public, there is no warrant in the statute to measure the license by the quantity the public may buy. The lack of any restriction in this respect fixes the status of the business and subjects it to the license sought to be recovered in this case.

Judgment affirmed.

No. 9486.

LOUISE HARVEY VS. GEORGE PFLUG.

If any one, under pretence of rights afterwards judicially determined to be unfounded, uses process of law to restrain another in the prosecution of a lawful claim, he cannot use the delay his own act has caused to defeat the claim he has wrongfully resisted. A party cannot provoke and protract litigation based on his refusal to deliver leased premises, and then avail himself of the lapse of time to avoid damages for his wrongful refusal. Prescription does not run pending the litigation thus provoked.

Where proceedings in ejectment have been taken and the defendant justifies his holding possession under an alleged unexpired lease and the issue has been determined against him, he cannot afterwards, when sued for damages for illegal retention of the property, set up again the alleged unexpired lease. The ejectment suit is *res adjudicata* upon that and cognate matters.

Among the damages that a lessor is entitled to recover from a recalcitrant lessee who unlawfully retains the leased premises is a bonus that another lessee has *bona fide* offered for a long lease, the rental during detention that such other lessee has engaged to pay, the attorney's fees paid by the lessor in getting possession of his property, and compensation for whatever advantages have been lost by the lessee's obstinate withholding possession.

APPEAL from the Civil District Court for the Parish of Orleans. *Lazarus*, J.

Jas. D. Séguin for Plaintiff and Appellee.

Henry P. Dart for Defendant and Appellant.

The opinion of the Court was delivered by

MANNING, J. The object of this suit is the recovery of damages caused by a lessee's unlawful retention of the leased premises.

In December 1880 and for some years antecedent thereto the defendant was lessee of certain property from the plaintiff by the month at $45 a month under a verbal lease. During that month Mrs. Clark offered the plaintiff to lease the premises occupied by Pflug for five years at fifty dollars a month, to make improvements of not less than $300 in value, and to pay cash a bonus of one thousand dollars for such lease. The plaintiff informed her that before her offer could be accepted Pflug must have the option of keeping the premises upon the terms and for the price offered by her. This new lease was not to begin until the following February. Pflug was promptly apprised of this offer and the option was given him of retaining the property. He did not avail himself of it.

On the last day of December the plaintiff entered into the contract of lease with Mrs. Clark and received from her one thousand dollars as a bonus. On the same day a written notice was served on Pflug requiring possession of the premises on the first of the following February.

Pflug did not vacate and on that day suit for possession was instituted in the proper court of Jefferson parish. The premises are immediately below Harvey's Canal and facing the Mississippi river and consisted of a brick house used as a shop or store.

The litigation thus begun did not end until January 10, 1882. Pflug interposed various exceptions in the Justice's court which were over ruled, and then answered setting up a lease of the premises from the husband of the plaintiff from November 1, 1880 for a year, and by supplemental answer and peremptory exception sought to oust the Justice of jurisdiction by averring that this lease exceeded one hundred dollars. Before decision of that issue, he applied to the District Court for a prohibition against the Justice taking further cognizance of the cause and obtained it. The Circuit court on appeal reversed that decision and ordered the Justice to proceed, and trial being had and judgment rendered against Pflug, he suspensively appealed to the District court which affirmed the judgment against him in January 1882 and he vacated eight days afterwards. This was nearly a year after the time when the plaintiff was entitled to possession and nearly three months after the expiration of the lease claimed by the defendant.

Meanwhile the plaintiff refunded to Mrs. Clark the bonus of one thousand dollars and in June 1882 instituted this action. The sum claimed is made up of the following items;—

Bonus refunded	$1,000
Rent lost for 11 months 18 days at $50 a month	580
Value of improvements that were to have been made	300
Attorney's fees	350
	$2,230

After a general denial and the plea of one year's prescription the defendant avers that at the time the ejectment suit was instituted in February 1881 he was in possession of the premises under an unexpired verbal lease from the plaintiff's husband for the yearly sum of $540 payable in monthly instalments of $45, and that the husband who acted and represented himself as owner repeatedly from year to year promised to allow that lease to continue on the same terms and conditions—that on the faith of this promise the defendant had made improvements worth $1200, and had besides expended other sums in painting etc.—that Mrs. Clark was his rival in business and neighbour and had mad the offer above detailed to get rid of him and monopolize the trade which seems to be considerable—and that when Mr. Harvey informed him of Mrs. Clark's offer he remonstrated that this was in violation of

his lease, and afterwards the plaintiff a stranger theretofore to him began the proceedings in ejectment. He claims $2,000 in reconvention as damages for loss of time, breaking up his business, cost of improvements, and disbursements for court costs and lawyer's fees.

The plaintiff moved to strike out all the reconventional demand except the item for repairs and improvements and it was done, and the case was tried by a jury. The plaintiff had a verdict for $1800 and there was judgment for that sum with interest from judicial demand.

The plea of prescription may be disposed of at once. During the pendency of the litigation provoked by the defendant's own acts, prescription did not run against the plaintiff. Even if the damages claimed are *ex delicto* less than a year elapsed from the close of that litigation to the beginning of this suit. A party cannot provoke and protract litigation based on his refusal to deliver leased premises and then avail himself of the lapse of time to avoid damages for his wrongful refusal. If any one, under pretence of rights judicially determined to have been unfounded, uses process of law to restrain another in the prosecution of his lawful claim, he cannot use the delay his own act has caused to defeat the claim he has wrongfully resisted. Boyle v. Mann, 4 Ann. 170; Stanbrough v. McCall, Ibid. 322; Martin v. Jennings, 10 Ann. 553.

As to the ownership of the leased property the proof that it is in the plaintiff is satisfactory, and there is abundant evidence throughout the record that when Pflug was verbally leasing from the plaintiff's husband and otherwise transacting business with him he knew that Mr. Harvey was merely a business-man for his wife and that the property was hers. The verbal lease from the husband for a year that Pflug had set up was not proved. It is true Pflug complains that he was prevented from proving it by the plaintiff's objection to its admission on the ground that the ejectment suit was *res adjudicata* on that and cognate matters. The objection was well taken. Pflug had resisted the ejectment on the ground of a pending lease and pleaded rightfulness of possession under it, and that issue had been determined against him. He cannot raise it again.

Sixteen written charges were presented to the judge to be given to the jury. He refused to give any of them and after examination of them we approve his refusal. We cannot say less and to say more would require an essay.

It is quite clear that the plaintiff is entitled to recovery. She has lost the bonus and the rent. The verdict gives her both and more, but not the whole of the two other items. She has paid $150 attorney's fees, and assuming that they are included in the verdict a small sum would seem to have been allowed for lost improvements. At any rate however the jury may have made up the sum we are satisfied the total is what it should be.

Judgment affirmed.

No. 9570.

CHARLES H. REED vs. HIS CREDITORS.

Every act required by law to perfect an appeal when taken, must be performed within the delay allowed for taking the appeal.

Hence a bond for a suspensive appeal, filed more than ten days, not including Sundays, after the date of the judgment, comes too late, and it cannot sustain a suspensive appeal. Nor can it sustain a devolutive appeal when it appears that the order of appeal was not in the alternative, but exclusively or solely for a suspensive appeal.

APPEAL from the Civil District Court for the Parish of Orleans. *Rightor*, J.

B. R. Forman for Plaintiff and Appellant.

W. H. Rogers, City Attorney, *Blave & Balter* and *H. P. Dart* for Defendants and Appellees.

ON MOTION TO DISMISS.

The opinion of the Court was delivered by

POCHÉ, J. The grounds of the motion are, that under an order for a suspensive appeal, the bond was not filed within the legal delay and that there is no prayer or order for a devolutive appeal.

Both grounds are supported by the record, and under the law the appeal must be dismissed.

The judgment appealed from was signed on the second of July, 1885, and the bond of appeal was executed and filed on the 15th of the same month, or more than ten days, not including Sundays, after the date of the judgment.

Appellant's motion, and the order granted thereon, were expressly and exclusively for a suspensive appeal, hence the present could not be maintained or hold good as a devolutive appeal, for the plain reason that it would come up without an order of appeal, an omission which has always been considered as fatal.

The following rule has been so often applied in our jurisprudence that it has now acquired the force of an axiom or of a legal maxim:

"Every act required by law to perfect an appeal when taken, must be performed within the delay allowed for taking the appeal." Wood admr. vs. Calloway, 21 Ann. 481; Ducournau vs. Levistones, 4 Ann 30; Dwight vs. Barrow, 25 Ann. 424.

Under its effect, the bond in this case was evidently filed too late, and hence the appeal as suspensive, cannot stand.

Now, as there is no order for a devolutive appeal, either directly or in the alternative, it cannot be maintained under that character, for no appeal will lie in the absence of an order therefor.

If the appeal is presented as suspensive it falls because the bond does not comply with the order, if it be held up as devolutive, it falls for want of an order. Poole vs. Chaffe & Sons, 36 Ann. 589; Phillips vs. Creditors, 35 Ann. 935; Weiser vs. Blaise, 34 Ann. 833; Bank vs. Barrow, 24 Ann. 276; Dupré vs. Mouton, 23 Ann. 543.

This appeal is, therefore, dismissed at appellant's costs.

No. 9434.

ADOLPHE SCHREIBER VS. BOARD OF ASSESSORS.

The shares of stock of the New Orleans Cotton Exchange have a money-value independent of and in addition to the privilege of membership which the ownership of them may secure to the holder. They may be owned and held by a person not a member of the Exchange, and when so held are received as collateral or as pledges by Banks, and other money-lending institutions. They are bought and sold as other stocks are and are therefore included in the taxable property of the holder and owner of them as being a thing possessing money-value.

The law authorizing subsequent assessment of property which had been omitted from the rolls in past years applies only to property which had been unlawfully and erroneously omitted, and not to property which was not assessable under the law in force in those years. The assessment of property in 1882 was governed by Act 77 of 1880; and the provisions of Act 11 of 1882, so far as assessments were concerned, applied only to future years.

This Court having held that the stock of the Cotton Exchange was not assessable under the Act of 1880, it follows that it was lawfully omitted from the rolls of 1882 and cannot by subsequent proceedings be assessed for that year.

APEAL from the Civil District Court for the Parish of Orleans. *Tissot*, J.

Henry C. Miller and *Bayne & Denègre* for Plaintiff and Appellee.

Wynne Rogers for Defendant and Appellant.

The opinion of the Court was delivered by

MANNING, J. The plaintiff seeks by this action to compel the defendant to strike from the rolls for 1882, 1883, and 1884 an assessment

of one share of stock of the New Orleans Cotton Exchange made against him as owner of it, on the ground that there is no law providing for the assessment or taxation of such shares.

In 1882 the Board of Assessors assessed against the Cotton Exchange all the shares of its stock, and we held that this was without warrant of law because the Act of 1880 had in contemplation the assessment and taxation of stock in money-making and dividend-paying corporations alone, and as it appeared that the Cotton Exchange was in neither of these categories, we annulled the assessment. N. O. Cotton Ex. vs. Bd. of Assessors, 35 Ann. 1154.

The assessment in that case was made under sec. 48 of the Act of 1880, Sess. Acts, p. 102, and the plaintiff argues that the assessment in this case, having been made under sec. 28 of the Act of 1882, Sess. Acts p. 128, which is identical with the other, the decision then made applies here and a similar decree must be entered. We do not think so.

These two sections of the two Acts are identical but there are essential differences in other sections. The Act of 1882 is more comprehensive than its predecessor and the assessment now made is based upon other Sections than that cited. The first Section of the Act of 1880 merely directs that taxes shall be levied upon the assessed valuation of all property within the State except such as is expressly exempted. The corresponding section of the Act of 1882 repeats this language and then proceeds to declare that "the term property as herein used means and includes all movable property, all personal property * * all shares of stock and all other things whatever possessing any money-value," and near the close of the Act there is a supplemental definition of various terms used therein, i. e. "the phrase personal property or movable property shall be held to mean and include all things other than real estate which have any pecuniary value, and moneys, credits, investment in bonds, stocks, shares in joint-stock companies or otherwise." Sec. 88.

It is not claimed that the Cotton Exchange is a joint-stock company nor is it, since in the suit against it we found that "it pays no dividends, lends no money, transacts no business of its own from which pecuniary profits result to itself or to its members," but it is manifest that shares in other companies are equally declared included in the phrases movable or personal property, and even if this were not broad enough, the term property alone is expressly defined as meaning *inter alios* all shares of stock and whatever possesses a money-value.

That the shares of stock of the Cotton Exchange have a money-value is apparent from the testimony of its President and Secretary.

Three or four years ago a share was worth forty-seven hundred dollars. It now ranges from one thousand to fourteen hundred dollars. Banks and other money-lending institutions receive the stock of the Exchange as collateral for loans and as pledges. It is quoted among other stocks and that too upon the boards of the Exchange itself. It is bought and sold as other stocks are and is sometimes bought as an investment. Any one may buy and hold it. No one can be a member of the Exchange unless he owns a share, and therefore it has a value outside of and beyond and in addition to its general market-value, as its ownership carries with it a personal privilege. But the ownership of a share does not entitle one to membership. There are seventy or eighty shares held by persons who are not members and they acquired them by purchase. The value of shares therefore does not depend solely upon the privilege or hope of being elected a member. They are bought as other stock is for speculation as well as investment. They have all the indicia of other securities, such as bank-stock, insurance-stock, etc. When the owner dies, they go among other assets into his succession. Like other stocks, their value fluctuates with the demand for them. If seventy or eighty persons, not now members of the Exchange and not holding any stock, should conceive that their business would be greatly promoted by membership or that other advantages would accrue to them thereby, and they should seek to buy shares, the seventy or eighty holders who are not members would find an instant demand for their shares and an appreciation of their market value would follow.

If these shares of stock be not taxable, it would be difficult to find any securities that are. They fall within the definition of property as including all shares of stock and of course within the broader designation of whatever has a money value.

Besides the objections to the assessment of 1884 there is an additional one to those of 1882 and 1883. These shares of stock were not assessed on the rolls for those years but have been placed upon supplemental rolls. This is expressly authorized by the Act of 1882 when it empowers the assessors to assess any property that may have been omitted. Sess. Acts, p. 122, sec. 11.

The lower court relieved the plaintiff from the assessment of his share of stock which we think is error. Therefore

It is ordered and decreed that the judgment of the lower court is reversed, and that the plaintiff's demand be dismissed and the defendant have and recover of him judgment rejecting the same and for costs.

DISSENTING OPINION.

POCHÉ, J. In the case of the Cotton Exchange vs. Board of Assessors, 35 Ann. 1154, we annulled the assessment of shares in the Cotton Exchange, on the distinct ground that there was no law providing for the assessment of that kind of property, or for the collection of taxes levied thereon.

In that proceeding the attempt was made to assess the shares against the corporation, and to collect the tax from that body.

In this case the assessment is made directly against the share-holder, but there is no other difference, and the right to tax the shares at all is yet the vital question at issue.

In the Cotton Exchange case, we said emphatically: "However clear may be the power or even the duty of the legislature to tax any particular species of property, the burden cannot be imposed until that power is exercised."

The question presented for solution is therefore to ascertain whether since the date of that decision, the legislature has sought to exercise or vivify that dormant power, in order to reach the shares of the Cotton Exchange.

The only legislation on the subject matter is to be found in Act 96 of 1882, and I have sought in vain for any language in that act which can in the least justify the conclusion that the law-maker intended therein or thereby to affect the taxable status of these shares of stock.

Section 28 of 1882 is a mere reproduction of section 48 of 1880, and both manifestly refer exclusively to money-making or dividend-paying corporations, and we have already adjudicated that the Cotton Exchange did not partake of either character.

Any language in section 1 of the act of 1882, which is general and directory in its character, tending to include this kind of property, must be controlled by and construed with reference to section 28, which is special and pointed in its provisions, and is therefore the law of the case. That rule of construction is too well settled by jurisprudence to admit of discussion at this day.

In my opinion, our statutes are to-day as barren of authority to tax these shares of stock as they were at the time that our Cotton Exchange decision was rendered, and I find no reason to justify a different conclusion in the instant case.

I therefore respectfully dissent from the opinion and decree of the majority in this case.

ON APPLICATION FOR REHEARING.

FENNER, J. Under this application, we have given our closest attention to the points and arguments presented, without being able to discover any principle under which we could hold that the shares of stock in the New Orleans Cotton Exchange are not property. Such a share is a distinct, concrete incorporeal right, a specific thing, which the proprietor holds and owns to the exclusion of all others; which he has the absolute right to dispose of; which is bought and sold in public market; which is heritable; which may be validly pledged; which is liable for his debts; and which thus possesses every element of property.

It has no connection, direct or indirect, with any of the classes of property which are mentioned in the Constitution as exempt from taxation.

We adhere to our conclusion that the broad language of Act 96 of 1882, includes such property and sufficiently evinces the legislative intent to subject it to taxation. Under that act there existed no legal obstacle to the assessment and taxation of such property.

There are two points, however, which were not called to our attention in the original argument and which, in a case of this character, we are disposed to make an exception to our general rule not to consider on rehearing, points not made on original hearing.

1st. It is objected that the assessment for 1884 is illegal, because not sufficiently specific. The terms of the rolls are: "Assessed value of share $1000 gross, deductions to be made." This obviously means deduction of the proportionate value of the real estate of the corporation otherwise taxed. Such deduction must necessarily be made and our own records suggest the reason why it was not made, viz: the contest existing, at the time, relative to the valuation of the real estate, which was decided by us and is reported in 37th Annual, p.—— As the objection raises no point of practical consequence, in view of the fact that, if this assessment were annulled, it would be again made with the deductions which must now be allowed, we see no necessity of subjecting the State and city to such useless expense and delay.

2nd. The next point is more vital affecting the assessment for 1882. In the case of the Cotton Exchange vs. Board of Assessors, 35 Ann. 1158, the opinion rendered by the majority of the court unmistakably decided, (quoting for brevity from the syllabus) that "Act No. 77 of 1880, had in contemplation the assessment and taxation of shares in money-making and dividend-paying corporations, and was not designed to embrace corporations like the Cotton Exchange."

But the Act of 1880 was the only law under which assessments of property in 1882, could be made. A review of the Act 99 of 1882 will show that it was passed only in July of that year, after the assessment rolls for the year had been made, and that its provisions with regard to the assessment of property only applied to succeeding years. Hence, it follows that under the law regulating assessments for the year 1882, as interpreted by us, the shares of stock in question were properly and legally omitted from the rolls.

Section 11 of the Act of 1832, authorizing subsequent assessment of property which had been omitted from the rolls in past years, obviously applies only to property which had been erroneously and unlawfully omitted and not to that which was not assessable under the law in force in those years. Hence that section does not authorize the assessment of these shares for the year 1882, because they were not then assessable under the law in force at the time.

This is so clear that the correction of our former decree may be made without the necessity of awaiting a rehearing.

For the purpose of making the correction, rehearing is granted, and in disposition thereof, it is now ordered and decreed, that our former decree herein be so amended as to read as follows: that the judgment appealed from be affirmed in so far as it cancels and annuls the assessment for the year 1882; and that, in other respects, it be reversed and that plaintiff's demand, with reference to the assessments for the years 1883 and 1884, be dismissed, plaintiff to pay costs of this appeal, and defendant to pay costs in the court below.

DISSENTING OPINION.

POCHÉ, J. Without waiver of any of my views as expressed in my dissenting opinion herein, I concur in that part of the present decree which releases the shares of the Cotton Exchange from taxation for the year 1882.

But I dissent from the opinion and decree of the majority in all other particulars. A second examination of the case has confirmed my opinion that there is now, no more than there was in 1882, no law in Louisiana under which these shares of the Cotton Exchange could be legally assessed and taxed.

Dealing with a kindred subject in the case of Forman vs. Board, 35 Ann. 825, this Court said: "Taxation is exclusively a legislative power, and, however clear the power or even the duty of the legislature to levy taxes on any particular species of property, until that

power has been exerted, the burden cannot be imposed." * * * "Such taxation is of a peculiar character, requiring special provisions for defining and ascertaining the income to be taxed, and cannot be considered as falling within the scope of general provisions touching the assessment and taxing of property."

I respectfully submit that the language used in that case should apply to the present controversy with irresistible force, and it should have led to a similar conclusion to that reached in the decision quoted from.

I am clearly of the opinion that a rehearing should have been granted in this case.

No. 8409.

PALMER DICKSON *et al.* vs. H. P. DICKSON *et als.*

Whilst a mortgage given by the widow in community during her administration of her deceased husband's succession, is not null, yet, it can have no effect beyond her actual interest in the property, determinable upon a settlement of the community Such mortgage considered under the circumstances of this case.

APPEAL from the Second District Court, Parish of Bossier.

[NOTE OF THE REPORTER.—The following opinion was delivered, on rehearing, in May 1884, at New Orleans, where the case, at first decided at Shreveport, had been removed by consent of parties. The original opinion is reported in 33 Ann., 1244. The present opinion was, by mistake, omitted from the 36th Annual.]

ON REHEARING.

The opinion of the Court was delivered by

TODD, J. Our previous decree was passed upon the decisions of our immediate predecessors, in the cases of Cestac vs. Florance, 31 Ann., 493; Durham vs. William, 32 Ann., 162.

A further examination of those decisions and the authorities which sustain them satisfies us that they only go to the extent of declaring that a widow in community cannot, whilst the succession is still under administration, and *before its debts* are paid, execute a valid mortgage on any specific property of the succession, to the prejudice of creditors of the succession. And were the question an open one, we might adhere to our previous decision, which was to the effect, that even in the absence of the conditions, she could not give a valid mortgage on any specific property of a succession, though personally interested therein to the extent of her community interest.

This case differs from the ones cited, in this, that though the administratrix, who is the widow in community, had not been discharged, yet, in point of fact, all the debts of the succession and the community had been paid long before the date of the mortgage, and there were no creditors, therefore, who could be prejudiced by her acts.

Under this state of facts it had repeatedly been held that the widow in community could bind by mortgage her interest in any property under her administration, or that such interest was the legitimate subject of a sale and mortgage. Heckman vs. Thompson, 24 Ann., 264; Same vs. same, 26 Ann., 260; Courcey vs. Clark, 7 L., 157; Preston vs. Humphreys, 5 R., 219; R. C. C., 2650–3289.

Whilst, therefore, a mortgage given by the widow in community, during her administration of her deceased husband's succession, is not

null, yet, at the same time, it can have no effect beyond her actual interest in the property, determinable upon a settlement of the community.

It is true that the widow's interest in the community rests upon the death of the husband, but subject to the payment of the community debts, and, therefore, not to be ascertained till a final settlement. It would thence follow that where a mortgage is given to a certain number of heirs, to secure a liability which the administration is under alike to all the heirs, resulting from her acts as administratrix, the giving of the mortgage could not confer a preference on the mortgagees over the other heirs. They are entitled to share alike, and no act or attempt to favor one or more heirs to the prejudice of the others can have such effect.

To this extent and limit, the operation of the mortgage may seem to strip it of all effect, and virtually pronounce it a nullity. This may be true, as relates to the heirs, but the mortgage is not without effect as to other persons. For instance, the mortgage in question would prevail and have precedence over any mortgage that the mortgagor might execute subsequently, in favor of a creditor or other person.

With these views, and whilst expressly limiting the legal effect of the mortgage attacked in accordance therewith, we think our previous decision ordering its cancellation as an absolute nullity must be set aside.

It is, therefore, ordered, adjudged and decreed that the decree heretofore rendered be set aside, and it is now ordered, adjudged and decreed that the plaintiffs' demand be rejected, with costs of both courts.

Manning, J., takes no part.

No. 9012.

IN THE MATTER OF THE BOARD OF ADMINISTRATORS PRAYING FOR RECOGNITION OF MORTGAGE AND RECOVERY OF ASSESSMENT IN THE FOURTH DRAINAGE DISTRICT.

Judgmemts which are absolute nullities cannot be revived. They cannot be continued in existence, when they never had any life.

John Crossley & Sons, limited, Plaintiffs and Appellants.

APPEAL from the Civil District Court for the Parish of New Orleans. *Lazarus*, J.

[NOTE OF THE REPORTER.—This opinion was not reported in full in the 36th Annual. It is thought proper to report it in full now.]

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an action by John Crossley & Sons, representing themselves to be warrant holders for a large amount to be paid out of drainage assessments, to revive the judgments herein rendered in February and March, 1873. They claim that they have sufficient interest to authorize them to seek the revival, in as much as the City of New Orleans has declined doing so and that unless proper proceedings are had within the ten years following the rendition of the judgments, they will die away by the lapse of time.

The main defense set up is that the judgments sought to be revived are absolute nullities and cannot be given a force and effect, a life, which they never possessed.

The District Judge in an elaborate opinion sustains that defense.

It is unnecessary to revive the jurisprudence which is well seated and which is, as contended, that a judgment which is an absolute nullity cannot be revived.

The judgments in question were decreed by this Court to be such nullities. The consequence is that they cannot be revived. 30 Ann., 363, 692; 33 Ann., 63; 34 Ann. 97; 35 Ann. 70.

Judgment affirmed.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA,

IN NEW ORLEANS DURING THE YEAR 1885,

AND NOT REPORTED IN FULL.

No. 9252.

Haspel Johnson & Co. vs. Thibaut, Sheriff and Tax Collector.

Property used for rice milling purposes is not exempt from taxation, 36 Ann., 347. Affirmed.

No. 9418.

J. C. Thompson *et al.* vs. Louis A. Fasnacht.

A tax sale under an assessment in the name of the estate of a deceased person, when it appears that the heirs of such decedent had been formally put in possession of his estate by a judgment of court eight years before the assessment was made, and besides, have been in actual possession thereof from the time of such judgment until the sale, is null, but the purchaser is entitled to be reimbursed the sum paid by him for taxes at the sale.

No. 9424.

T. S. Barton *et al.* vs. Board of Assessors.

The shares of the Stock Exchange are taxable against the individual holders thereof, in the same manner as are those of the Cotton Exchange.

No. 9289.

The Atlas Cordage Company vs. Edward Adler.

Only questions of fact involved

No. 9349.

Louis Rayssiguier vs. Sarah Bour.

Only questions of fact involved

No. 9457.

George W. Ruleff vs. John Cooper & Son.

Only questions of fact involved.

OPELOUSAS—1885.

No. 1258.

Partnership of Comeau & Richard.

Only questions of fact involved.

INDEX.

ACTION.

A party who brings an action must have an actual interest which he pursues.

Hence a ship agent cannot personally recover damages which he charges to have been caused to vessels consigned to him on account of overcharges on towage, when the amounts alleged to have been overcharged were paid by the owners or charterers of the vessels themselves. *G. Corrall & Co. vs. Eclipse Tow Boat Co., p.* 803.

ADOPTION.

An act of adoption, executed in the manner prescribed by law, confers on the adopted child against the adoptors all the rights of a legitimate child, *provided* they do not interfere with those of forced heirs.

Rights thus conferred can no more be divested by a will than can be those of a legitimate child, born of the adopting person.

The disposition which a married woman, who leaves no forced heir, makes under such circumstances, in favor of her husband, of the bulk of her estate, is reducible to the disposable portion.

Succession of Julia Lilienthal, 839.

AGENCY.

In the absence of express or implied agreement, an agent is not authorized to *retain* out of the funds of his principal in his hands any amount which may be due him, *unless* the same be for necessary disbursements, expenses and costs, a stipulated commission or a liquidated debt. The law forbids a mandatory from offsetting, except in such cases. R. C. C. 3022–5.

Wade R. Young vs. M. I. Jackson, 810.

APPEAL.

Where two defendants were jointly sued for a claim exceeding two thousand dollars and judgment was rendered as prayed, and only one appeals, the Supreme Court has jurisdiction, although the appellant is liable only for one-half and that half is less than the appealable sum. *L. D. Dalcour vs. C. P. McCan et al., p.* 7.

The claim of a parish against a riparian owner in said parish, for costs incurred by the Police Jury in making and repairing the public levee and the public roads on the owner's property, is not in the nature of a tax, toll or impost, or of a fine, forfeiture or penalty

APPEAL—*Continued.*

imposed by a municipal corporation, and if the amout of such claim is not equal in amount to the lower limit of our jurisdiction, the appeal cannot be sustained in this Court.

Police Jury of Plaquemines vs. Mrs. Mitchell et als., p. 44.

An appeal from a judgment of a Recorder's Court on the ground that the case involved a contestation as constitutionality and legality of a "fine, forfeiture or penalty imposed by a municipal corporation," cannot be maintained when it does not appear from the record that such "contestation" was raised in the Lower Court prior to final judgment. *The State vs. Tsni Ho et al., p.* 50.

Where an error has been made in the judgment of the Lower Court in favor of the appellee which he endeavors to correct, and applies to the lower judge to correct it and to the opposing counsel to permit its correction, he will not be mulcted in the costs of appeal because this court does what he vainly endeavored to have done below. *J. Oteri vs. S. Oteri, p.* 74.

A deposit of money in Court, equal in amount to the sum prescribed for a suspensive appeal bond, stands in lieu of the bond.

But such deposit must be made within the time that a suspensive appeal bond is permitted to be given. If made or tendered after that time has expired, the deposit is not receivable.

Although the judge did not fix the amount of the bond until the tenth day, no complaint was made of want of time to comply with the order, but a bond was given and when it proved worthless the fault was with the appellant.

The State ex-rel. Rayssiguier vs. Judge, etc., p. 113.

The appeal taken by an administratrix, in her official capacity, from a judgment against her individually, striking out from the account presented by her an item in her favor individually, will be dismissed.

The appeal should have been taken and the bond furnished by her in her individual capacity.

The rule does not always apply to executors who, unlike administrators, stand sometimes in a different position. 32 Ann. 890, Payne vs. Dejean, affirmed. *Succession of Joseph Mausberg, p.* 126.

A devolutive appeal taken by a warrant or a bond holder under Act 11 of Extra Session of 1875, requiring the action of the Supreme Court on all warrants or bonds the validity of which is questioned as a prerequisite to the funding of such warrant or bond, must be

APPEAL—*Continued.*

governed by Article 593, Code of Practice, which denies the right of appeal, if a year has expired since the date of the final judgment.

The Supreme Court has no jurisdiction in such matters, but by appeal—which must be brought by the party who has recovered judgment, if the defendant Board refuses or neglects to appeal.

An appeal in such a proceeding, taken after a year has expired from final judgment, will be dismissed.

R. S. Charles, etc., vs. Board of Liquidation, p. 176.

After judgment and expiration of delay for suspensive appeal, the party cast preserves the right to a devolutive appeal within one year, but all power to prevent the execution of the judgment is lost. Sale under such execution passes valid title.

The party may, therefore, take such steps as the law authorizes to prevent the sacrifice of his property, without thereby acquiescing in the judgment or forfeiting his right of appeal. His acting in the appointment of appraisers, attending and bidding at sale and like conservatory acts, do not constitute acquiescence in the judgment, barring appeal.

Factors and Traders' Ins. Co. vs. New Harbor Protection Co. et. al., p. 233.

It is the duty of clerks of court, in making transcripts of appeal for transmission to this Court, to observe the rules of this Court and the law relative to the confection of such transcripts.

Where transcripts transmitted here, under a certificate attesting their completeness, are materially deficient by the fault of the clerk making the same, the Court will not permit them to be patched up by additional or supplemental transcript, but will order the clerk to make, at his cost, a new entire transcript of the record below, such as he should have made at first under the rules of the law, and will eventually exercise its punitory powers and inflict a fine. R. S. 1907.

An unverified charge that a transcript is defective by the fault of the appellant will not justify the dismissal of the appeal.

The appellant is protected by the full certificate of the clerk, where it is not shown that he knew the transcript to be deficient, and procured the certificate notwithstanding.

The clerk of the district court will not be held to make, at his cost, a a new transcript, although that filed here was made in disregard

APPEAL—*Conttnued.*

of the rules of this Court, and is defective, where it is claimed by him that the transcript was thus made by the appellant, or under his supervision. The question of cost should remain an open one.

N. T. Edson vs. M. McGraw, et al., p. 294..

The delay of two years granted to non-residents for the purpose of appealing from a judgment rendered by the courts of this State, under the provision of Article 593 of the Code of Practice, is not affected by the death of the non-resident who is cast in a suit; but this right, like all others, is transmitted to his legal representatives, even though his succession is administered in this State by a resident administrator.

The provisions of that article apply as well to plaintiffs as to defendants who are non-residents.

Succession of T. J. Martin vs. Succession of P. Hoggatt, p. 340.

A suspensive appeal cannot be allowed, when the petition is filed *after* the expiration of the delay within which such appeal should be asked. *The State ex rel. Hargrove, Adm., vs. Judges, etc., p.* 372.

A motion to dismiss an appeal because of the deficiency of the transcript, which contains no note of evidence, bill of exception, or statement of facts, cannot prevail if the appellant has filed, within legal delays, an assignment of errors which presents an alleged error of law appearing on the face of the record, and which can be disposed of without reference to evidence or matters of fact.

The act of an appellant in filing in the same Court another suit for the same causes of action alleged in the suit decided against him, after taking an appeal therein, will not be constituted as an acquiescence in the judgment so as to defeat his right of appeal.

A. Meyer vs. Z. Schurbruck, p. 373.

An appeal cannot be prosecuted and the case must be stricken from the docket, where the transcript of appeal or papers purporting to constitute such, have been filed *after* the expiration of an extension of the return day originally fixed.

Succession of P. G. Quin, p. 391.

It is of constitutional requirement that the rules of practice in and for the Supreme Court shall govern the Circuit Courts in the matter of regulating appeals.

Where the Circuit Court had made a rule requiring a certain detailed statement to accompany the original papers and dismissed the appeal of its own motion because the same had not been filed, this

APPEAL—*Continued.*

Court will on *certiorari* direct such dismissal to be set aside because not in conformity to the practice in this Court, and because the Constitution has required that appeals to the Circuit Court shall be tried on the original papers.

Where the law or a rule of Court has imposed a duty on the clerk and he neglects to perform it, the punishment for his fault will not be visited on the appellant by a dismissal of his appeal.

The right of appeal is a legal and constitutional right and the judges of Appellate Courts have no power to defeat or destroy such a right for failure to comply with conditions imposed by their own rules, but not sanctioned by any provision of law.

The power of Courts to make appropriate rules for the transaction of business before them, to require compliance with such rules and to enforce it by proper orders and penalties, is not questioned, but dismissal of the appeal is not a proper or lawful penalty and is one beyond judicial authority to inflict.

The State ex rel. Levy vs. Judges, etc., p. 395.

Lis pendens is a matter of plea. Where it was not pleaded in the Lower Court, it cannot be raised on appeal.

Succession of Kate Townsend, p. 408.

On appeal, a judgment will not be reversed or annulled in favor of a party who has not appealed therefrom, or prayed for an annulment. *Leeds & Co. vs. Peter Jones, p.* 427.

This Court has no jurisdiction over an opposition to an executor's account when the amount claimed is less than $2000. and the fund to be distributed does not exceed that amount; and on its own motion must dismiss the appeal.

A creditor has no right to oppose each and every *item*, on a tableau of distribution, in a thoroughly solvent succession, where, *after* an amount amply sufficient to meet his claim has been retained, the payment of such *items* cannot possibly affect or injure him.

Such an opposition, for want of interest in the opponent, is frivolous on its face and cannot arrest the distribution, *except* so far as may be necessary to provide for payment of the claim, if ultimately allowed.

Where the fund thus arrested does not exceed $2000, an appeal does not lie from the judgment on the opposition to this Court, which is devoid of jurisdiction. *Succession of L. C. Gohs, p.* 428.

Although an appellee and plaintiff is estopped from denying his jurisdictional allegation of damages sustained and his motion to dis-

APPEAL—*Continued.*

miss will be refused, yet if upon an examination of the case on its merits it appears that the damages claimed are wholly unreal and fictitious, and all parties have treated the case as not involving any moneyed demand whatever, and thus want of jurisdiction is disclosed, the court will dismiss the appeal of its own motion.
Columbia Fire Company vs. Firemen's Charitable Association, p. 541.

An order of the Civil District Court dismissing an appeal from the city court on the ground that the record of appeal was filed *unstamped*, is invalid in the absence of any law requiring such records to be stamped before filing.

The stamp act of 1880 does not apply to appeals in such cases, which had then no legal existence.

The right to appeal from judgments of city courts in certain cases was conferred by the amendments of Articles 130 and 135 of the Constitution adopted in 1884.

The Act of 1880 did not propose to repeal the anterior legislation regulating costs in cases of appeal from justices of the peace, which is not on the same subject matter.

Costs incurred in appeal cases from the city courts are limitable to *five* dollars, by rule of court, and recoverable in stamps.
The State ex. rel. Cittarotto vs. Judge, etc., p. 573.

Where, upon the return of testimony taken below under our order and the report of the lower judge thereon, it appears that the judgment appealed from has been voluntarily executed, the appeal will be dismissed.
G. Powell vs. S. & I. Hernsheim et als., p. 581.

In the country, an appellant on application will be allowed time to complete the clerk's certificate where the motion to dismiss is taken on the day on which the case is called for trial and three judicial days from the return day have not elapsed, and this though the cause may be submitted, the appellant not being strictly at fault. *E. J. Smith vs. W. W. Johnson, p.* 677.

An appeal will not be dismissed because of irregularity in the citation of appeal and return thereon, when citation has been prayed for.

An appeal bond for a suspensive appeal is in time when filed within the year following the adjournment of the court in the country. The delay is not to be computed from the date of the signature of the judgment during term.

Res judicata is not a ground for dismissal of an appeal. It is a means of defense which can be urged on the merits only.

APPEAL—*Continued.*

A second motion to dismiss made after submission of the cause is too late. *F. K. Phillips vs. Creditors, p.* 701.

An appeal from a judgment rendered by the district court for Terrebonne parish, returnable to this court *"according to law,"* is not returnable at *Opelousas*, but at New Orleans, on the second Monday of February. *H. C. Minor vs. Budd, Sheriff, et al. p.* 709.

An extension of time to file a transcript, although seasonably asked, will not be granted where it appears that the appellant instructed the clerk months previous to the return day not to make the transcript, and that it is owing to this injunction that the record was not prepared. *J. J. Gibert vs. J. A. Tassin, p.* 739.

Where a party is tried for violating a city ordinance relating to private market, and in his defense charges that the ordinance is unconstitutional and illegal, he has the right to appeal from a sentence against him; and after the appeal, if suspensive, is perfected by the execution of the required bond, the recorder imposing the sentence is deprived of all jurisdiction over it and can be prevented from executing by a writ of prohibition.
The State ex rel. Notal vs. Judge, etc., p. 827.

The right of appeal from an order setting aside on bond a writ of sequestration, depends alike upon the irreparable injury which the order may cause to the party obtaining the sequestration.

An order of court, authorizing the seized debtor to release his property from seizure on bond, although rendered on a rule contradictorily between the parties, is not a final judgment, but an interlocutory decree, from which no appeal lies unless such judgment may cause an irreparable injury to the party against whom it is rendered.
The State ex rel. Roth vs. Judge., etc, p. 846.

Every act required by law to perfect an appeal when taken, must be performed within the delay allowed for taking the appeal.

Hence a bond for a suspensive appeal, filed more than ten days, not including Sundays, after the date of the judgment, comes too late, and it cannot sustain a suspensive appeal. Nor can it sustain a devolutive appeal when it appears that the order of appeal was not in the alternative, but exclusively or solely for a suspensive appeal. *C. H. Reed vs. Creditors, p.* 907.

ARREST.

The confession of judgment by a debtor arrested for debt, does not authorize his release from imprisonment. 1 Ann. 126, 31 Ann. 799.

ARREST—*Continued.*

There exists no discrepancy or disparity between the law relative to the release from custody of such debtor, in proceedings in cases of arrest by District Courts, and that on the subject, by parties of the peace or City Courts. They are substantially the same.

The city judge had jurisdiction of the case and the proceedings appear to have been regularly conducted.

The application for a *certiorari* to vitiate the proceedings is refused.

The State ex rel. Williamson vs. Judge, etc., p. 385.

ATTACHMENT.

When property attached has been sold *in limine* under C. P. 261, the proceeds take the place of the property and still continue to be "property attached, and subject to the right of the defendant to "bond in every stage of the suit," under C. P. 259.

The State ex rel. Gerson vs. Richardson, Judge, etc., p. 261.

In a proceeding where a non-resident creditor has attached in Louisiana property of a non resident debtor fraudulently brought in this State, the rights thus acquired cannot be defeated by a receiver appointed under a creditor's bill, by a court of another State, by means of an intervention in which he claims the property as receiver for the purpose of bringing the same within the jurisdiction of the court wherein he holds his appointment.

The general rule is that such a receiver is the mere creature of the court appointing him, and his powers cannot be exercised beyond the confines of that State.

For the purpose of claiming the protection of our courts, no discrimination can be made between residents or citizens of this State and citizens of another State. It suffices that the seizing creditor whose rights are assailed by a foreign receiver, be not a resident or citizen of the State whence the latter derives his powers.

Lichenstein Bros. & Co. vs. Gillette Bros., p. 522.

An order granted and signed by the clerk for an attachment to issue needs no seal.

A creditor who sues out an attachment solely on the ground that his debtor had given a mortgage to another creditor, and who is proved to have asked a mortgage for himself before the mortgage complained of was given cannot complain of an unfair preference and justify an attachment on that ground.

The damages awarded by a jury will not be disturbed when no substantial reason appears therefor.

G. Seeligson & Co. vs. A. Rigmaiden & Co., p. 722.

ATTORNEY AT LAW.

An attorney at law, who represents an heir in the settlement of a succession, may legally be appointed *ad hoc* to represent anot er heir who is absent from the State.

An acknowledgment of service of judicial proceedings is not a waiver, but an admission of actual service. An opposition by such attorney, to the executor's account, objecting to *items* thereon, is in the nature of an answer and cures what irregularity may have existed, if any.

The appointment of such attorney by a District Judge who once was the counsel of the executor, if irregular, is not void. That fact did not make him incompetent. He would become so when actually recused or recusing himself for cause.

Heirs of Fly vs. E. Noble et al., p. 667.

AUCTIONEER.

Sections 142, 143 and 146 of the Revised Statutes relative to auctioneers must be construed together. Their true meaning is that the auditor cannot, in any case, forfeit or cancel an auctioneer's license, without the sanction or authorization of a judgment of a competent court previously rendered, and decreeing the forfeiture of such license. Under the provision of those sections, the auditor has no authority to sit in judgment over auctioneers, touching their alleged delinquency for taxes or dues which they may owe to the State. *The State ex rel. Girardey vs. Steele, Auditor, p.* 316.

BANKRUPTCY.

The decision of the Supreme Court of the United States, rendered since the original decree in this case, has settled the vexed question of the construction of the exemption from discharge in bankruptcy of debts contracted "while acting in a fiduciary character," and has held that such exemption only embraces technical trusts, such as those of executors, administrators and the like, and does not include trusts resulting from the relation of agents, commission merchants, etc. This reverses the former jurisprudence of this Court on this subject, and, the question being purely Federal in its character, we shall hereafter follow the decision of the highest Federal Court.

An analysis of the instrument sued on in this case satisfies us that the debt created thereby was not, under this construction, excluded from the discharge in bankruptcy.

Although a discharge in bankruptcy is ordinarily personal to the debtor, yet when discharged creditors attack the transactions of the

BANKRUPTCY—*Continued.*

bankrupt which took place after the discharge, his transferrees are entitled to the benefit of such discharge, and cannot be deprived thereof, when properly pleaded, by the failure of his collateral heirs, who are themselves estopped from attacking such transfer, to plead the discharge in their own defence. Such a case is not within the purview of Moyer vs. Dewey, 103 U. S. 101.

A. M. Upshur et al. vs. M. E. Briscoe et als., p. 138.

BILLS OF LADING.

A stipulation in a bill of lading of non-liability for loss from delays for any cause is unreasonable and will not relieve the carrier from liability for losses caused by negligence.

Putting in default is not necessary before suing for damages for an active violation of a contract, and unreasonable delay in transporting freight is in active violation of a contract for its transportation.

Obstructions and difficulties that might and ought to have been foreseen are not legal excuses or justifications for non-delivery, and damages are recoverable for losses actually sustained by reason of such non-delivery.

L. F. Berje vs. Texas & Pacific R. R. Co., p. 468.

BOARD OF HEALTH.

The provisions of Article 178 of the Constitution directing that: "The General Assembly shall * * * provide for the establishment and maintenance of a State Board of Health," do not make it the imperative duty of the Legislature to thus provide by means of appropriations from the State Treasury.

The authority for such appropriations may be traced thereto, but it is merely permissive and not mandatory.

Hence, the warrants issued to Board of Health, under the Act 52 of 1884, are not strictly constitutional warrants, and are not entitled to preference of payment out of the General Fund.

The State ex rel. Board of Health vs. Burke, Treasurer, p. 196.

The charter of New Orleans empowers her Council to fix the compensation of every officer of her own or of the State whose salaries are to be paid by herself, and to prescribe the number of such officers.

The exercise by the Board of Health of the power to appoint sanitary inspectors and policemen at salaries larger than the appropriation made by the City Council will warrant, and to require the city to pay them, is inconsistent with and in derogation of the city's right to fix the compensation of all officers that are to be paid by her.

BOARD OF HEALTH—*Continued.*

Discretion is lodged in the Council as to the amount of the appropriation to be annually made for the Board of Health and the Board has no control over it. It can expend that and no more.

The State ex rel. Board of Health vs. New Orleans, p. 894.

CONSTITUTIONAL LAW.

The amendment of 1884 to Art. 130 of the Constitution did not destroy the old or create new district courts for the Parish of Orleans, but merely altered the jurisdiction of the existing courts.

The amendment to Art. 146 of the Constitution only relieved the Judicial Expense Fund from contribution to *future* criminal expenses It granted a preference on said fund in favor of the officers named therein over all *future* charges on the fund; but it did not operate retroactively to destroy the valid, vested rights of prior legal warrant holders.

W. J. McGeehan et al. vs. Burke, Treasurer, p. 156.

The title of a legislative act need not be a synopsis of its contents. It is sufficient if it indicate the general purpose of the law, without specifying each provision thereof.

The legislature usurps the functions of the judiciary when it pronounces the forfeiture of the chartered rights of a corporation and executes its own decree by taking possession of the corporate funds.

The legislature can delegate to the State Treasurer authority to demand and receipt for certain funds, and the authority to demand includes *ex vi termini* authority to demand judicially or stand in judgment for the State.

The State can reclaim a donation made by it to a corporation when the condition upon which it was made has not been fulfilled and the time for its performance has passed.

But she cannot confiscate funds in the possession of the corporation, donated by others, and appropriate them to her own use or to the use of another corporation.

Louisiana Trustees American Printing House, etc., vs. V. J. Dupuy, 188.

Act 16, of the General Assembly of 1864, directed the issue of $10,000,000 of State bonds, and required the Governor to sell or exchange the bonds for treasury notes, Confederate or State.

A number of these bonds were given in exchange for sugar, to meet the wants and exigencies of the State government. *Held*, that such disposition of them violated the mandatory requirement of the

CONSTITUTIONAL LAW—*Continued.*

law, and the holder of them acquired thereby no right or title to them as would enable him to have them funded and exchanged for consolidated bonds under the funding act of 1874.

The presumption in favor of official acts, that they are rightly done, is not a presumption *juris et de jure*, but one open to contrary proof.
B. J. Sage vs. Board of Liquidation, p. 412.

The act 63 of 1868, entitled an act relating to public roads, is unconstitutional and void. *J. Torres et al. vs. F. Falgoud, p.* 497.

CONTEMPT OF COURT.

Courts have inherent power to punish for contempt and our Code of Practice has expressly conferred it, but a judge cannot assume or decide that a witness has sworn untruthfully and punish him for the perjury as a contempt.

Refusing to answer a question that a witness is bound to answer is contumacy and is punishable as a contempt. Answering such question untruthfully is perjury, the punishment of which is remitted to the regular action of the criminal law.
The State ex rel. Terence vs. Lazarus, judge, p. 314.

The power of the judge of any court to punish, by fine and imprisonment, a witness for refusing to answer truthfully to any questions put to him, which is simply perjury, cannot be derived from Art. 136, Code of Practice, or from any other provision of our law. Perjury is a felony, which cannot be punished otherwise than accordiug to the prescribed forms of law.

An order from a district judge fining and imprisoning a witness on such grounds, can be examined by this Court under a *certiorari*, and the order will be annulled and set aside.
The State ex rel. Kane vs. Lazarus, judge. et al., p. 401.

CONTESTED ELECTION CASES:

Where the suit is in its inception a contested election case and the appeal comes up on a question of pleading at the proper time and place for appeals in such cases, it will not be dismissed on the ground that the suit has been converted into an action under the Intrusion Act which should have been returned in ten days.

An appeal from a judgment dismissing the suit cannot be dismissed for prematurity.

Where a suit has been stolen from the Court House and the plaintiff files another reciting the allegations of the first and other proceedings therein, the plea of *lis pendens* is not maintainable.

CONTESDED ELECTION CASES—*Continued.*

A stolen suit may be reconstructed and reinstated in other ways than that specifically provided by general special statutes. A new petition setting forth the allegations of the first, or incorporating a copy of it, may be as efficacious and is as permissible as the special methods pointed out by the statutes.

Neither is it necessary that the lost suit should be reconstructed by judgment of the Court in a separate and independent suit before renewing the allegations upon which the contest for the office is made, although the facts that the allegations and objects of the two suits are substantially the same and that the first was brought with the formalities and within the time prescribed, must be satisfactorily established before the defendant can be compelled to answer to the merits of the main action.

The new petition is a substitute for the first and a trial is had upon it as it would have been had upon the first with the additional issues raised, whether such first suit had ever in fact been instituted and the proceedings had thereunder as alleged.

O. Holphen vs. U. A. Guilbeau, et al., p. 710.

In a contest for the office of Justice of the Peace, under the Intrusion into Office Act, two commissions had issued, one to each of the litigants. In the last commission there was recital that the first commission had issued in error. *Held*, that the second commission was the higher authority, and the one holding it had a *prima facie* right to the office.

The State ex rel. Hunter vs. R. L. Capers, p. 757.

CONTRACTS.

The transfer of a judgment, "so far as the same now remains unpaid," with subrogation to existing rights against the person and property of the debtor, does not authorize the transferee to assail prior contracts of the original judgment creditor, under which, for due consideration, certain property had been released from the judicial mortgage resulting from the record of the judgment; nor does it subrogate the transferee to the rights of the transferrer to complain of non-compliance with alleged terms of such extra judicial contract. In any event, the transferee could not judicially claim the nullity of such contract without making both parties thereto parties to his suit.

Where antecedent tender is required, a mere written communication demanding the cancellation of a contract and expressing the willingness to return what had been paid, when not actively declined

CONTRACTS—*Continued.*

or refused, is not a substitute for the tender itself, or an excuse for not actually making it.

J. I. Adams & Co. vs. S. Friedlander, p. 350.

The rule of law (C. C. art. 1933) which requires, in an action sounding in damages for the passive violation of a contract, that the debtor be first put in default, has for its main object to secure the right of the creditor to claim his damages against an offer of the debtor to execute the agreement. Hence it cannot be invoked as a defense by a defendant who absolutely denies the existence of any contract. As a means of defense, the failure to put in default must be specially pleaded.

A party who violates his contract in bad faith will be held responsible for all damages, including those which could not be foreseen at the time of making the contract, which can be traced to his breach of contract.

All damages must be proven with legal certainty. Statements of items in globo, without details when called for, are not sufficient.

T. A. Beck vs. F. B. Fleytas, p. 492.

A party who seeks the annulment of his contract on the ground of error, must establish error as to the nature of the contract, or as to the substance of the object of the contract, or as to the substantial qualities of such contract.

Where the notarial act evidencing the contract read and signed by the complainant discloses fully and truthfully its nature and object, with all its substantial qualities, the party cannot set up error on these points.

Where a party unconditionally assumes a liability, contingent as to its eventual amount, as in the case of the stock mortgages of the Citizens' Bank, he is bound thereby, although he erroneously believed that such liability would be nothing, or less than it proves to be, such error affects the *accidental* and not the *substantial* quallity of the object, and cannot affect the contract unless induced by the fraud or false representations of the other party.

He who alleges fraud must prove it. If the false representations which induced such error were made by a third person, without the knowledge or procurement of the other party to the contract, the validity of the contract is not affected thereby.

Lesion, however enormous it may be, has no effect to invalidate the

CONTRACTS—*Continued.*

contracts of persons of full age and under no incapacity, except certain designated contracts, of which this is not one.

J. W. Prescott vs. B. Cooper et al., p. 553.

The contract involved is interpreted and held to be a valid reciprocal contract, by which the plaintiff was bound to furnish, and defendant receive and pay for, hogsheads and barrels, as required under the terms of the contract, at the prices fixed; and also, that defendant was bound to pay for the articles as delivered. Campbell vs. Lambert, 36 Ann. 35, commented upon.

Plaintiff having delivered certain barrels and hogsheads, which had not been paid for, though the bill had been presented at defendant's office, and having informed defendant's agent that he would furnish no more because his bill had not been paid, and no offer to pay having been afterwards made, was not in default during the term of his contract.

The breach of contract complained of being one of nonfeasance, and there being no legal excuse for omission to put in default, defendant's reconventional demand for damages is rejected.

F. Landèche vs. D. Sarpy, p. 835.

CORPORATIONS.

Corporations created under the General Law of the State, (R. S. 683 *et seq,*) have no power to create a corporation distinct and independent from themselves. The word *persons* found in the law were designed to mean *natural persons* and not juridical persons. Human beings, capable of contracting alone can create a corporation within the purview of the statute.

Where an attempt has been made by corporations to create such corporation and property has been acquired in the name of the concern, the parties in interest unwilling to own it in indivision can have it sold and the proceeds distributed *pro rata.*

Factors and Traders' Ins. Co. vs. New Harbor Protective Co. et als., p. 233.

Exceptions to the corporate capacity of the Workingmen's Bank and to the official capacity of its liquidation are overruled.

The exception that the bank was not the owner of the claim sued on was matter of defense and properly cumulated with the merits.

The former decision in 29 Ann. 369, is *res judicata* on the questions that the former "Workingmen's Accommodation Bank," obligee of the bond herein sued on was not a corporation, and that said claim was the property of the individual member of said concern.

CORPORATIONS—*Continued.*

No portion of the members could transfer the rights of the others without their consent, nor was the legislature competent to make such transfer.

In order to maintain their action, plaintiffs must establish that the corporation under liquidation by them, owns, or represents the ownership of the stock in the concern. To the extent of the interest so established, they may maintain the action and recover their proportion of the total liability on the bond. This must be established by legal evidence such as suffices to prove title.

The books of the Workingmen's Bank may be evidence of ownership of its own stock; but they are not admissible to establish its acquisition of the interests of members in the former concern.

The judge erred in holding that the Workingmen's Bank acquired rights of the former concern by any title of succession—and as he has not passed on the proofs going to show specific transfers from members, the case is remanded.

E. Hincks et al. vs. G. T. Converse et als., p. 484.

COURTS.

The attempt of a district court to annul a judgment of the Supreme Court, is a most dangerous usurpation of authority which cannot and will not be tolerated in this State.

Succession of T. J. Martin vs. Succession of P. Hoggatt, p. 340.

CRIMINAL LAW.

APPEAL.

Where a party convicted of stealing certain movable property of a railroad company, appeals from the sentence imposed therefor, and bases his appeal solely on the ground that the corporate existence of such company was not proved on the trial, though averred in the indictment, it amounts in effect to a contention that he was convicted on insufficient evidence, and in the absence of a bill of exception taken on the trial with respect to said alleged omission, or of any charge asked of the judge touching the effect of said omission, this Court is without power to inquire into this matter of fact, and to consider evidence on the point where taken on a motion for a new trial. *The State vs. Philip Reilly, p.* 5.

Our Code of Practice does not assume to regulate criminal pleading and has nothing whatever to do with it.

An appeal in a criminal case lies only from the sentence or final judgment, unless the ruling of the court upon a motion, plea, or other interlocutory matter finally disposes of the case.

CRIMINAL LAW - *Continued.*

The meaning of the sentence "whenever the punishment of death or imprisonment at hard labor may be inflicted" is whenever the offence charged is one the legal punishment of which is death or imprisonment at hard labor.

When an appeal has been taken by the defendant from an overruling of any plea that does not finally dispose of his case, the appeal will be dismissed if the Attorney General so moves.

The State vs. Phylos Wilkins, Jr., p. 62.

A defense in a criminal case that the law under which the defendant was tried and convicted is unconstitutional, comes too late when made on appeal for the first time. The appellate court cannot consider and determine questions of law which were not submitted to, and passed by, the trial judge.

The State vs. A. Romano, p. 98.

The forfeiture of an appearance bond is a proceeding in a criminal case, and the appeal from the judgment of forfeiture is not to be tested by the rule applicable to civil actions.

Whenever the offence charged in the indictment is of a grade that gives us jurisdiction because one of the jurisdictional punishments may be inflicted, that fact attracts jurisdiction to the appearance bond that was given in that criminal proceeding. The test of our jurisdiction is not the amount of the bond but the grade of the offence charged.

The forfeiture of an appearance bond given without authority will be set aside.

The object of an appearance bond is to secure the trial of the offender rather than to fill the coffers of the treasury, and therefore when after forfeiture the sureties bring the offender into open court during the term when the bond was forfeited, the judgment of forfeiture should be set aside, provided there is no collusion or deceit or fraud practiced or attempted to be put upon the court.

The State vs. Joshua Williams, p. 200.

A motion in arrest of judgment which charges no error and refers to affidavits which are not in the record, is not entitled to notice and is properly overruled.

An assignment of errors filed long after the submission of the case and which, in itself, is without merit, will not be considered.

The State vs. Malone, alias Kinch, p. 266.

CRIMINAL LAW—*Continued.*

This is an appeal from a conviction of murder and a sentence of death, in which the record contains no plea or proceeding within the province of the Supreme Court in criminal matters, and is not even supported by a brief of counsel for the appellant.

The habit among certain members of the bar, of making appeals in capital criminal cases, and not following them up, is to be deprecated. *The State vs. Robert Williams, p.* 311.

The rules which regulate the confection of transcripts of appeal in civil cases, apply alike in criminal cases.

A transcript of appeal in a criminal case, which contains no other matters but the record of the defendant's motion for a new trial, and which purports to be such under the certificate of the clerk, is utterly insufficient and cannot sustain an appeal.
The State vs. R. Johnson, p. 621.

The State can appeal in criminal cases from a judgment sustaining a motion in arrest of judgment when the case is otherwise appealable. *The State vs. A. Robinson, p.* 673.

Evidence taken in support of a motion for a new trial, in criminal cases, will not be considered on appeal unless it be incorporated in or attached to a bill of exceptions taken from the refusal of a new trial by the judge *a quo*. *The State vs. J. Redwine, p.* 780.

It cannot be claimed that an appeal is *devolutive*, where the appeal asked and allowed is *suspensive*, in express terms.

An appeal cannot be taken from a judgment before it is rendered, or a bill taken before the ruling is made by the Court.

Taking an appeal *instanter* from a judgment quashing an indictment and ordering the discharge of the accused and the cancellation of their bonds, is not an act of acquiescence.

An appellant who prays for an appeal returnable according to law, is not chargeable with any fault, where he suggests neither time nor place, and where the judge fixes both of his own motion.

The filing of a transcript long before the return day is no cause for dismissing the appeal. *The State vs. M. Lague et als., p.* 853.

CHANGE OF VENUE.

In criminal prosecutions, on the hearing of the application for a change of venue by the accused, based on alleged prejudice in the community and on public excitement against him, it is competent to question a well informed witness on his opinion as to whether the

CRIMINAL LAW—*Continued.*

CHANGE OF VENUE.

accused can obtain a fair and impartial trial in the parish wherein the indictment is pending.

On the hearing, on such an application, *ex parte* affidavits taken on behalf of the accused are not admissible in evidence. The only evidence which the law contemplates is evidence taken in open court and contradictorily between the parties.

Conceding that the finding of the trial judge on such application is subject to review on appeal, this cannot be done if the record does not contain the evidence adduced at the hearing.

The State vs. Thomas J. Ford et als., p. 443.

CHARGE.

Objection to the charge of the trial judge to the jury, unless made at the time when the same is given and unless properly presented by bill of exceptions, will not be considered on appeal.

The State vs. Thomas Sweeney, p. 1.

In criminal cases the Snpreme Court will not consider alleged errors in the charge of the trial judge to the jury, when suggested in an assignment of errors, and when no objection was made to the charge when given, unless upon its face the charge should appear to be unjustly and glaringly erroneous. State vs. Riculfi, 35 Ann. 774; State vs. Curtis, 34 Ann. 1215; State vs. Beaird, 34 Ann. 106, affirmed.

The charge must be considered as a whole, and the practice of selecting therefrom isolated passages for criticism and animadversion, will not be sanctioned, when it appears that such passages, although apparently erroneous, are fully explained by other passages in the instructions. *The State vs. Wm. Ferguson, p.* 51.

Bills of exception to special charges refused by the judge cannot be sustained, when it appears from the statement of the judge in the bills, that they are trenched upon the facts, or were entirely inapplicable to the facts; or when it appears that the statement of the law had been covered by the general charge in less objectionable form.

When the judge has not been requested to deliver his charge in writing, he is at liberty to make it orally; and the fact that he has made it partly in writing and partly orally, is no ground for valid objection.

A bill of exception taken simply "to the entire charge of the Court," without specifying any ground of objection, or any particular portion objected to, will not be considered, nor can error in a charge,

CRIMINAL LAW—*Continued.*

CHARGE.

not excepted to, be considered under an assignment of errors in this Court. *The State vs. Perry Melton, et al., p.* 77.

The charge of the judge that "the evidence is short, clear and to the point and leaves not much room for doubt," is a clear violation of the letter and spirit of Section 991 of the Revised Statutes, and necessitates the remanding of the case.

The State vs. George Asberry, p. 124.

The trial judge will be upheld for refusing to charge abstract principles of law, which, under the facts and in his opinion, have no bearing on the case.

In charging the jury that under the Constitution they are the judges of the law and of the facts, the judge may and should add that they must follow the law as given to them by the Court.

The State vs. Thomas J. Ford, et als., p. 443.

A trial judge cannot be asked to charge a jury, in a criminal prosecution, as to what the law is in a case which is not before them, but totally differs from it. As well might he be called on to read to them the Civil Code and the Code of Practice, or the Institutes of Justinian. *The State vs. A. A. Labuzan, p.* 489.

In criminal cases trial judges cannot be required to charge to the jury abstract principles of law, having no connection with or bearing on the state of facts disclosed, or the nature of the charge in the case on trial. State vs. Riculfi, 35 Ann. re-affirmed.

The State vs. John Daly, p. 576.

The charge to a jury in a criminal case must be taken as a whole. Isolated parts if objectionable may be controlled by other expressions and all taken together may be good law. It is not error to charge a jury that they could safely accept the law from the judge. The judge might have put it stronger and have charged that it was the jury's duty to accept it. *The State vs. W. Hannibal, p.* 619.

EVIDENCE.

On cross-examination, the witness may be asked by the State as to his feelings towards accused, as throwing light upon his credibility.

Where a subject matter, not perhaps strictly pertinent, has been opened on examination in chief, the other side may pursue it on cross-examination.

Error in exclusion of unimportant evidence will not justify reversal.

The presumption of guilt from flight applies generally to cases of persons suspected of crime which has been secretly committed, but

where the killing has taken place in a public fight and in the presence of witnesses; where there is no dispute that accused killed deceased, but the only question is whether the circumstances excused or mitigated the killing; the flight could have no weight as a presumption of guilt, and, in absence of any allusion to it in the charges of the judge or in special charges asked, we consider exclusion of evidence explaining the fight, as not sufficiently material to authorize reversal.

The State vs. Perry Melton et al., p. 77.

Objections to the reception of testimony cannot be made in an assignment of errors. They must be made on the trial, and bills of exception taken to the ruling thereon.

Alleged discrepancies in the testimony of witnesses are matters of fact for the exclusive consideration of the jury in criminal causes.

The State vs. V. Price, p, 215.

The following question propounded in a case of murder, by the district attorney to a leading State witness, not shown to be an unwilling witness, is amenable to the two-fold objection of being a leading question, and also as intended or calculated to elicit from the witness an expression of opinion, and not a statement of facts within his knowledge, from which the jury alone is authorized to draw inferences, or to form deductions: "Would the defendant, after having struck the deceased with a rail, have had time to pull his knife out of his pocket, open it and cut the man when he did?" As framed the question is suggestive of the answer expected from the witness. Besides, the witness should have been asked questions on facts which could assist the jury in drawing their own inference—but the witness could not be permitted to give his own theory from the facts which he knew.

The State vs. Witte Parce, p. 268.

Declarations of accused made after the crime and while the coroner's jury is sitting on the inquest, are not part of the *res gestæ* and are inadmissible.

When the State, on cross-examination of a witness, has elicited from him a statement by the accused to a particular and isolated fact, the defense has the right to question the witness as to everything said by accused connected with or bearing upon said fact; but it does not entitle the defense to introduce other self-serving declarations of accused having no connection with that subject, made during a conversation of an hour or more. The connection

CRIMINAL LAW—*Continued.*

EVIDENCE.

between the two is not more apparent than if they had taken place at different times.

The other errors assigned are sustained by the record or are untenable.

The State vs. J. K. Rutledge, p. 378.

Proof of violent character of person wounded, in a trial for wounding less than mayhem, is properly rejected, unless proper foundation has been laid by evidence of overt act, hostile demonstration or threats on his part.

The State vs. A. Saunders, p. 389.

A bill of exception is not the proper remedy to compel a trial judge to allow one of the parties to incorporate certain evidence in the previous bill reserved by him. The writ of mandamus is the remedy pointed out by law. The refusal of the trial judge to allow a party to incorporate in a bill testimony which is not shown by the record to have been reduced to writing under orders of the court, cannot vitiate a trial.

An indictment jointly against several parties for murder includes in its terms the charge of conspiracy; proof of the same is, therefore, admissible, although conspiracy be not specially charged in words.

When conspiracy has once been proved, in the opinion of the trial judge, evidence of the acts and declarations of one of the conspirators in the prosecution of the common design is admissible against all the others.

In determining whether a proper foundation has been laid, by proof of an overt act of attack by the deceased or by the accused, for the introduction of evidence of the bad and dangerous character of the deceased and of previous communicated threats made by him against the accused, the trial judge is vested with the legal discretion of refusing to believe one or more witnesses and to ignore their affirmative testimony, if, in his opinion, not arbitrarily, he believes that the reverse is true.

The Governor's proclamation offering a reward for the capture and conviction of the parties to a crime, for which the trial is had, is not admissible in evidence, being irrelevant to the issue.

The State vs. Thos. J. Ford et als., p. 443.

Evidence to establish prior threats is inadmissible unless proof be first given that there was an overt act of attack, and that the defendant, at the time of the collision, was in apparent imminent danger.

CRIMINAL LAW--*Continued.*

EVIDENCE.

In the absence of proof of a hostile demonstration by the deceased, evidence of threats made against accused, to prove that the latter had a right to kill, is irrelevant.

No one has a right to kill another simply because he has made some threats against him.

Witnesses should not be cross-examined on the assumption that they have testified to facts, touching which they have given no testimony.

Where no foundation has been laid as to the quarrelsome disposition of the accused and the case does not present a single element of self-defense, questions: whether the witness is acquainted with the reputation of the deceased as being of a quarrelsome disposition, or otherwise, and whether that reputation was good or bad, are properly ruled out; the more so when there was shown no attack by the deceased and no disposition on his part which gave the accused reasonable ground to believe that he was about to be attacked. *The State vs. A. A. Labuzan, p.* 489.

If a mortal blow is unlawful and malicious, and death ensues, the perpetrator is guilty of murder, whether he intended or not to kill, as he is responsible for the effects of such blow, though he did not intend to kill.

The intent need not be proved as a matter of *fact.* It may be presumed, or inferred from the circumstances of the transaction.
The State vs. J. Walker, p. 560.

Where a witness introduced by the defendant has sworn that he did not know a certain thing to have happened, and other witnesses are offered by the defendant to prove that it did happen and he knew it, their testimony should be received although the effect of it is to contradict his own witness. The main substantive thing to be proved was a fact inconsistent with the prisoner's guilt, and the knowledge of that fact by the first witness was only an incident.
The State vs. P. Simon, p. 569.

The fact that stolen goods are shortly after found in the possession of the accused in a case of larceny, creates a *prima facie* presumption of his guilt, and throws upon him the burden of accounting satisfactorily for the way that he came by said property, in default of which the legal presumption will be sufficient to justify conviction. *The State vs. John Daly, p.* 576.

CRIMINAL LAW—*Continued.*

EVIDENCE

Error in excluding testimony offered to contradict a witness who has testified that the confession of the accused was voluntary, is inconsequential when the excluded testimony was afterwards heard and went to the jury, and when the judge states that it could not have affected his ruling admitting the confession.

In prosecution for embezzlement of funds of a foreign corporation, it is sufficient to prove the *de facto* existence of the corporation, and it is not essential to prove the law of the State under which it was incorporated and the conformity of the charter thereto.

A statement by the judge that the charter received in evidence is "in due form," must be held to refer to the *form* as supporting its admissibility and not to its sufficiency as proof.

There is no error in the judge's permitting to be read to the jury documentary evidence which had been duly offered and received in evidence, even after submission of case and delivery of the charge. The jury had the right to hear such evidence read, and might themselves have asked it, even after retiring to deliberate.

The State vs. P. W. Collens, p. 607.

In absence of proof of some overt act or hostile demonstration by deceased at time of killing, evidence of prior threats and dangerous character is irrelevant and inadmissible.

Although some testimony may have been given tending to show a hostile demonstration, yet, if it is improbable, inconsistent with all the proven facts and circumstances of the case and considered by the judge as totally unworthy of credence, he is not bound to accept it as establishing the necessary foundation for the introduction of evidence of prior threats and character. He is the judge of whether such foundation has been laid and is necessarily vested with the discretion to ignore testimony which his reason refuses to believe. State vs. Ford, recently decided.

The State vs. R. Janvier, p. 644.

Ignorance of the name of an accused party from whom a confession of guilt was received is of no moment when the party himself is identified as the person who made the confession.

The State vs. Jerry King, p. 662.

A letter written after the homicide by a brother of the deceased to one of the witnesses for the defendant is irrelevant to the sole inquiry before the jury and was properly excluded.

The State vs. A. Robinson, p. 673.

CRIMINAL LAW—*Continued*

EVIDENCE.

Where, when a case is on trial, a subpœna issued to a witness formerly residing in an adjoining parish has not yet been returned, evidence may be received showing that he has left and is absent from the parish, and that it is impossible that the subpœna should reach him. Such evidence lays a sufficient foundation for the introduction of the testimony of such witness taken on the preliminary trial, where it appears that his absence and whereabouts were unknown to the District Attorney, so as to enable him to have secured his attendance.

Objection to the statement by a witness of conversation overheard between the accused and another person, on the ground that the witness was playing the eavesdropper, may go to the effect, but not to the admissibility of the evidence.

Where witnesses are heard on matters affecting solely the questions touching the admissibility of evidence, and to be determined by the judge alone, there is no error in hearing them out of the presence of the jury. *The State vs. B. Allen et al., p.* 685.

When the defendant has elicited evidence tending to discredit a witness of the State who had sworn that his reason for not sooner informing against defendant was fear of the latter, evidence offered to sustain his credibility, by proving that he had declared his fears of defendant at the time and that such fears were reasonable, owing to the character and conduct of defendant, is not admissible.
The State vs. J. W. Redmond, p. 774.

The ruling of the trial judge that no overt act, threat or hostile demonstration had been proved, and therefore that no foundation had been laid for the admission of proof of the character of deceased, is final unless manifestly arbitrary and not of sound legal discretion.

It is not within the province of the jury to decide whether a foundation has been laid for proof of the deceased's character. That question cannot be submitted to them from the very nature and mode of procedure in a criminal trial.

The judge who presides at a criminal trial must necessarily have heard the evidence submitted to him of overt acts, threats, etc., and he is not compellable on a motion for a new trial to review his own ruling that such evidence was insufficient to admit proof of charac-

CRIMINAL LAW—*Continued.*

EVIDENCE.

ter, nor can he be complained of if he refuses to hear evidence to show that he was wrong in his ruling on the trial in that regard.
The State vs. J. Kervin, p. 782.

Evidence of violent and dangerous character of deceased, in a murder case, is inadmissible unless supported by the foundation of proof of assault or hostile demonstration at the time of the killing.

Where the judge states as his reason for excluding such evidence that the proof did not establish such foundation, we cannot reverse his ruling. *The State vs. R. Jackson, p.* 896.

GRAND JURY.

An objection to the organization of the grand jury that found the bill cannot be made for the first time in the appellate court.

It is not necessary that the proceedings relative to the selection of the grand jury shall be in the record of appeal unless specific objection had been made in the trial court thereto, when the appellant for his own protection must have them inserted. Where no objection has been made below, it is sufficient if it appear that the grand jury came into court and presented the bill.
The State vs. V. Price, p. 215.

INDICTMENT.

Where the defendant formally pleads to an indictment and is tried and convicted and subsequently obtains a new trial, and at this second trial, moves to withdraw his plea in order to file a demurrer, the granting or refusal of the motion is largely within the discretion of the trial judge and his refusal of the motion at this stage of the cause, in the absence of any averment that the plea was entered through error or inadvertance, will not be disturbed.

An indictment for shooting with intent to murder is sufficient in law, which charges, in substance, that the accused did, with a pistol, feloniously, wilfully and maliciously shoot one S. B * * * with the felonious intent the said S. B * * * with malice aforethought to kill and murder. It is not necessary that the word wilfull should precede or characterize the *intent.*
The State vs. Marshall, alias Green, p. 26.

An alleged defect in an indictment cannot be reviewed on appeal it urged in a motion for new trial. Such a ground must be presented by means of a motion to quash or a motion in arrest of judgment.
The State vs. Tony Taylor, p. 40.

CRIMINAL LAW—*Continued.*

INDICTMNET.

When money is the thing stolen our statute dispenses with any description of it in the indictment. It is sufficient to describe it simply as money without specifying any particular coin or bank note, and proof of the larceny of any coin or bank note will sustain the charge, although the particular kind of coin or bank note is not proved.

When the statute dispensed with any description of money by the designation of the kind of coin or bank note, it equally dispensed with the need of assigning a specific value to it, because money, unlike ordinary chattels that are the subject of larceny, denotes value, and the mention of the denomination as dollars or cents, contains in itself the statement of its value.

And hence the charge in an indictment that the accused "feloniously did steal, take, and carry away certain money, to wit the sum of ten dollars, of the goods and chattels of one John Losch" is sufficient in law without specifying the value of ten dollars.

The State vs. Mike King, p. 91.

In an indictment for arson it is not necessary to charge the house was set on fire with malice aforethought, but merely "wilfully and maliciously," nor does it vitiate the indictment that the copulative is used when the statute has wilfully *or* maliciously.

The State vs. V. Price, p. 215.

Any fraudulent making or alteration of any writing mentioned in our statute, or writing included in the terms therein used, constitutes of forgery.

It is not necessary to set out in the indictment the particular acts that constitute the crime, but is sufficient to charge that the defendant did feloniously forge a certain check.

The charge that the defendant forged a check or bill of exchange is not vicious for duplicity. A check may be described in an indictment for forgery as a check or bill of exchange.

The object of our statute in permitting the forged instrument to be described by its ordinary designation was to exclude the need of designating it by its exact legal name. *The State vs. A. Maas, p.* 292.

Where the record does not show that an indictment was returned into court by the grand jury, the case must be remanded and the sentence set aside.

To justify the quashing of a venire on account of irregularities in the drawing of the same, it must appear that a fraud was committed

CRIMINAL LAW—*Continued.*

INDICTMENT.

or a great wrong done, to the serious prejudice of the party or parties accused.

Under an indictment charging an assault by wilfully shooting at, a conviction will not be set aside because of the refusal of the trial judge to instruct that it must appear that the assault was made with a malicious intent. *The State vs. R. Sandoz, p.* 376.

An indictment charging two distinct offenses, belonging to the same given class, in separate counts, is not vicious.

A verdict under such an indictment, acquitting the accused of the greater and convicting him of the lesser charge, is not erroneous, as not being responsive to the indictment.

The State vs. R. Green, p. 382.

In an indictment for an assault with intent to murder, it is not necessary to set forth the mode of assault, or the means or weapon with which the assault was made.

The State vs. Killis Jackson, p. 467.

An indictment under Act 8 of 1870, denouncing the offense of shooting at a house occupied by persons lawfully therein, is not amenable to the charge of duplicity, because, of the averment that the shooting was with intent to murder a person named in the house.

The State vs. J. Minan, p. 526.

Burglary and larceny may be joined in the same count in an indictment. They are an exception to the general rule that two distinct offences cannot be joined in the same count.

The State vs. Jerry King, p. 662.

Objections to amendment of an indictment must be made when it is offered, or when the court has allowed it, and they must be incorporated in a bill of exceptions. They cannot be urged in a motion in arrest of judgment.

The State vs. A. Robinson, p. 673.

One indicted as principal in a murder cannot be convicted thereunder as accessory after the fact. *The State vs. A. Robinson, p.* 685.

An indictment which did not comply with the requirements of the statute which creates or defines the offense sought to be charged therein is fatally defective and cannot sustain a conviction.

An indictment charging that the defendant "did feloniously and of his malice aforethought kill and murder," etc., is not good in law, under Section 1048 of the Revised Statutes, which provides that the

CRIMINAL LAW--*Continued.*

INDICTMENT.

defendant should be charged with having "feloniously, *willfully* and of his malice aforethought killed and murdered," etc.

Courts are powerless to dispense with legal requirements in criminal pleadings. *The State vs. S. Williams, p.* 776.

An indictment charging burglary and larceny in a single count is not bad for duplicity. *The State vs. W. Nicholls, p.* 779.

There is no reason to quash an indictment because of a defect in one count thereof, where the other count is perfect.

There is no repugnancy in the two counts of an indictment, one of which charges larceny and the other receiving stolen goods knowing them to be stolen.

In the count for receiving stolen goods, it is not necessary to aver the name of the thief or of the person from whom the goods were received. *The State vs. M. Laque et als., p.* 853.

INFORMATION.

An information charging a threat to burn an entire town, with a malicious intent to destroy the dwelling houses, stores, etc., of all the property holders of said town, is not defective under Act 64 of 1884, on the grounds that it does not name any person against whose property the threat was made or against whom the malice existed. The information conformed to the facts charged. The malice and threat were not directed against any particular individual, but, against an entire community. It would be useless and unreasonable to require the setting forth of the names of all the property owners. The crime consisted in the threat to burn the buildings, etc., of another or of others, with the malicious intent to destroy their property.

The State vs. George Asberry, p. 124.

JURISDICTION.

This Court has no jurisdiction to review the facts submitted to a jury in a criminal case, so as to determine the correctness or incorrectness of their verdict.

The State vs. Thomas Sweeney, p. 1.

A complaint in a trial for burglary, that the evidence failed to show that the deed was committed during the night time, and that the evidence which was circumstantial was not sufficient to convict, embodied as a ground for a new trial, cannot be considered by this Court, whose jurisdiction in criminal cases extends to questions of law alone. The Supreme Court cannot review the ver-

CRIMINAL LAW—*Continued.*

JURISDICTION.

dict of the jury on questions of facts. The jury are the sole judges of the guilt or innocence of the accused under the evidence.

The State vs. Tony Taylor, p. 40.

JURY.

Error in refusing challenges of jurors for cause, even if committed, will not avail to reverse judgment, if the objectionable jurors have been peremptorily challenged, and the defendants have been able to complete the jury without exhausting their peremptory challenges.

The State vs. Perry Melton et al., p. 77.

Act 54 of the General Assembly of 1868 defines the qualifications of jurors throughout the State, and provides for the selection of competent and *intelligent* jurors.

There is no conflict between this Act and Act 98 of the same year. The latter Act by requiring the commissioners to draw the names of one thousand persons from those qualified to register as voters, from which to select competent jurors, does not thereby determine that such persons entitled to register are competent jurors. They must be guided by Act 54 in determining the question of competency.

The jurors must be, under Art. 116 of the Constitution and the Act 54, *intelligent* persons, and it is not an improper or illegal discretion on the part of the Jury Commissioners, under certain conditions, to determine the question of intelligence of a juror by his ability to read and write, not as an exclusive test, but as one of the means to such end.

It is not every error on the part of the trial judge that will suffice to set aside a verdict. It must be so serious as to justify the belief that the accused was prejudiced thereby, and but for such error, a different result might have been reached in the trial.

The State vs. Foster Chase, Jr., p. 165.

Jurymen are not permitted to impeach their own verdict. Public decency and public policy alike forbid that jurymen who have sworn to render a true verdict shall be permitted to swear that they rendered a false one.

The State vs. V. Price, p. 215.

An irregularity in the manner of drawing the jury, unless it be alleged and shown to be accompanied by fraud or a great wrong,

CRIMINAL LAW—*Continued.*

JURY.

cannot avail an accused on appeal. It is not every irregularity in criminal practice that works injury.

The State vs. P. Egan, Jr., p. 368.

A juror who has formed and expressed an opinion on the guilt or innocence of the accused, based on reading of publications, purporting to contain the evidence received on a previous trial of the same case, but who declares that he is free of bias or prejudice, and feels that he can try the case fairly and impartially, is not incompetent.

An error of the trial judge in ruling over the qualifications of a juror, is not sufficient to invalidate the trial, if it appears from the record that the juror did not serve in the case, and that the peremptory challenges of the accused were not thereby exhausted

In a trial of several accused jointly, the peremptory challenges of the defense cannot be said to be exhautsed as long as any such challenges are yet left to one or more of the accused.

The State vs. Thos. J. Ford et als., p. 443.

Objections to a juror must be made when he is presented. They come too late after conviction. *The State vs. A. Robinson, p.* 673.

Where in a trial for murder a juror stated on his *voir dire*, that he lived in the neighborhood of the plantation where the homicide was committed and heard of the facts attending it immediately after its occurrence, and had formed and expressed an opinion concerning it, and that opinion was against the accused; and that the deceased was a close friend of his, and is thereupon challenged for cause by the accused, and the challenge overruled, and he is sworn as a juror, the peremptory challenges of the accused being exhausted.

Held: That the ruling was erroneous and so much to the prejudice of the defendant as to vitiate the verdict.

The State vs. H. Jackson, p. 768.

The overruling of a challenge of a juror for cause, even if improper, is not ground for reversal when the juror was peremptorily challenged and when the panel was completed without exhaustion of defendant's peremptory challenges.

The State vs. J. W. Redmond, p. 774.

State vs. Johnson, 37 Ann. 422, maintaining sufficiency of jury oath to find verdict "according to the evidence," affirmed.

The State vs. G. Logan, p. 778.

CRIMINAL LAW—*Continued.*

JURY.

Jurymen are not incompetent who have formed and expressed an opinion adverse to the prisoner if that opinion is based on rumor and they declare it is not fixed and will yield to evidence.

The State vs. W. George, p. 786.

State vs. Johnson, 37 Ann. 422, maintaining sufficiency of oath to find a verdict "according to the evidence, reaffirmed.

Refusal to instruct the jury that they are judges of the law as well as of the facts, is flagrant and fatal error. The Constitution says that in criminal cases they shall be judges of the law, and instruction to that effect cannot be denied, though the Court may expound to them the nature of their duties in relation to the law as laid down by the judge, which they should accept and apply.

The State vs. G. Vinson, p. 792.

An accused cannot accept a juryman when he has good cause of challenge, take the chances of a verdict in his favor, and when disappointed present the objection in a motion of arrest of judgment. Much more is he forbidden to make the objection after conviction when, having been informed of it in open court by the juryman himself, he consents that the latter shall sit. The disqualification being such that the prisoner could waive it.

The State vs. S. Jackson, p. 897.

NEW TRIAL.

Applications for a new trial on the ground of newly discovered evidence ought not only to set forth the proper averments, but should also be verified by oath. *The State vs. Thomas Sweeney, p.* 1.

New trial on the ground of newly discovered evidence will not be enforced when the witnesses were known before trial, but could not be found, and when no postponement was asked on account of their absence, nor when the evidence is merely cumulative and corroborative and not calculated, in the opinion of the judge, to produce a different result on another trial.

The State vs. A. Lamothe, p. 43.

A new trial is not grantable for alleged ability to prove false swearing of a witness when no attempt was made to obtain testimony to support such allegation and no diligence is shown.

The State vs. V. Price, p. 215.

A motion for a new trial on the ground of misconduct of the jury, when unaccompanied by a bill of exception setting forth the facts, cannot be considered.

A motion in arrest, based solely on a charge of error against the

CRIMINAL LAW—*Continued.*

NEW TRIAL.

decree refusing such motion for new trial, on the ground that it is contrary to law and evidence, is not entitled to notice.
The State vs. J. Walker, p. 560.

When an accused does not ask for the appointment of an attorney to defend him nor inform the court that he has one engaged, but announces that he is ready for trial, chooses to defend himself unaided, cross-examines the State's witnesses and examines his own, and is convicted, he cannot obtain a new trial on the ground that his counsel was absent from sickness or other cause.
The State vs. A. Vianna, p. 606.

STATUTES.

A partial concealment of a dangerous weapon is a violation of the statute prohibiting carrying concealed weapons. It should be fully exposed.

A pistol half stuck in the pocket or about the clothes, even though a part of it may be visible, is carrying a concealed weapon within the meaning and intent of the statute.

The word "concealed" has a statutory sense, contradistinguished from its ordinary meaning, and must be construed so as to give potential effect to the law. *The State vs. Lacy Bias, p.* 259.

Act 7 of 1880 deals exclusiuely with regular terms of the district courts and the prohibition of fixing such terms so as to conflict with those of the circuit courts, does not apply to special called terms.
The State vs. J. K. Rutledge, p. 378.

The common law form for the oath administered to a jury in criminal cases was legislated into the State by the Act of 1805, and may, without error, be adhered to until changed by legislative direction.

The Article 168 of the present Constitution only gives constitutional sanction to what was substantially the law of this State prior thereto, and affords no reason, not previously existing, for changing the form of the oath. *The State vs. Thomas Johnson, p.* 421.

Revisory legislation, embodied into a system of laws and termed the Revised Statutes of the State, which embrace antecedent statutes of a general nature on various subjects, and reduces them to one body and one text, repeals all prior statutes upon the same subjects not included in the revision, especially where it contains an express repealing clause.

So, the third section of the act approved the 22d February, 1817, denouncing the crime of concealment by the mother of the death of

CRIMINAL LAW—*Continued.*

STATUTES.

her infant child and declaring the penalty therefor, was repealed by the repealing clause of the Revised Statutes of 1870 (Section 3990 thereof), the said section not being included in said Revised Statutes and not being excluded from the operation of said repealing clause by express exception or mention therein.

The State ex rel Susanne Jarvo vs. Judge, etc., p. 578.

Section 1010 Revised Statutes regulates the methods of conducting preliminary examinations in criminal cases; and, so far as the testimony of witnesses is concerned, it is only required that it should be reduced to writing by the magistrate or under his orders, and it is not made necessary that it should be signed by the witnesses or certified by the judge. When, on trial, the witness is unobtainable after due diligence, his former testimony so taken, when its genuineness and official character are properly established by proof, may be used in evidence.

The State vs. B. Allen, et al., p. 685.

In a prosecution for knowingly and maliciously sending a letter to another threatening to accuse him of a crime, under act 64 of 1834, the use of the words "willfully, maliciously and feloniously" is the certain and entire equivalent of the words "knowingly and maliciously" employed in the statute.

An admission, made to avoid a continuance, that the prosecuting witness has made frequent threats against the accused, does not debar the State from proving on the trial the times and circumstances under which such threats were made.

Proof of the truth of the charges threatened to be made is not *per se* a justification under the statute, though such proof, in connection with other evidence tending to rebut the malicious intent, might under some circumstances be admissible.

This offense is entirely different from libel, and neither the letter nor the reason of the constitutional provision permitting the truth of the libel to be given in evidence has any application here.

The only qualification of the crime is that the act denounced was done "knowingly and maliciously," i. e., with malicious intent; and while charging that the malice must be established, the judge did not err in charging that the particular character of the malicious motive was of no consequence.

It is no obstacle to a conviction under Act 64 that the evidence might have supported the graver offense denounced by Act 63.

CRIMINAL LAW—*Continued.*

STATUTES.

The statute does not violate the constitutional guaranty of liberty of speech. *The State vs. A. A. Goodwin, p.* 713

Criminal statutes cannot be extended to cases not included within the clear import of their language.

Act 64 of 1884 does not denounce as an offense the accusing another of a crime with malicious intent, but only malicious *threats* to make such accusation. A verdict of guilty of charging another with malicious intent, convicts of no crime known to the law of Louisiana, and, on motion in arrest, the same must be set aside.

The State vs. P. C. Peters, p. 730.

TRIAL.

Continuances are peculiarly within the legal discretion of the trial judge in criminal cases. Refusals to grant them will not be interfered with unless in cases of flagrant error, or gross abuse of power. The *onus* rests upon the accused to show the same affirmatively.

An *affidavit* for a continuance, on the ground of the absence of a material witness, necessary to prove assault by the deceased on a described person, and to establish self-defense, is insufficient, where the accused does not at least, by his own sworn declaration, identify himself with such person.

The State vs. James Clark, p. 128.

Error in the charge of the judge to the grand jury is no ground to quash the indictment found by them.

Where no bill of exception is taken to the overruling of a motion to quash an indictment, this court cannot review evidence taken on the trial thereof, though found in the record.

Evidence cannot be offered in support of a motion in arrest of judgment, which must rest on errors apparent on the face of the record. Where the trial is a continuous proceeding, begun and completed at an uninterrupted sitting of the court, and the minutes show that the prisoner was present at the beginning thereof, his continued presence will be presumed.

The State vs. Squire White, p. 172.

Failure of the record to show his presence at the filing, arguing and overruling of motions for new trial and in arrest of judgment is immaterial.

Where the trial occupied but one day and was continuous and uninterrupted, one mention of the prisoner's presence in court is enough.

The State vs. V. Price, p. 215.

CRIMINAL LAW—*Continued.*

TRIAL.

Where an affidavit for a continuance in a criminal case meets all the requirements of the law, and is made at the same term the indictment is filed, the trial judge cannot refuse the continuance for the reason that he does not believe the accused is swearing to the truth.

There is no legal authority for traversing the averments contained in such affidavit.

If the affidavit swears that the witness is material, it is not required he should swear to his competency.

The State vs. D. Bolds et al., p. 312.

Under a showing that an accused, in a case pending in New Orleans, when witnesses do not live at great distances from the court, took necessary steps to summon his witnesses within three days of the notice of trial, and seven days in advance of trial, is *prima facie* proof of due diligence. Under such a showing, the absence of a witness residing in said city, but temporarily absent therefrom, whose attendance the accused had sought to secure by moving for necessary process to be served in the parish where the witness is supposed to be at the time, such steps being taken seven days before trial, will entitle the accused to a continuance of his cause.

The State vs. P. Egan, Jr., p. 368.

After trial has begun, accused cannot obstruct its progress by motions for attachment of jurors who are absent; and refusal to grant attachments in such case is not in error.

The State vs. A. Saunders, p. 389.

Witnesses regularly *subpœnaed* and served to attend the trial of a stated criminal case, at a regular term, are bound to attend at such term and at any special term duly ordered, without being resummoned, and to hold themselves in readiness to serve until regularly discharged.

An application for a continuance, on the ground of the absence of such witnesses is well founded, and should not have been overruled, because the witnesses should have been *subpœnaed* anew.

The State vs. Jefferson Davis, p. 441.

The arrest and indictment for perjury of witnesses for the defense, in connection with their testimony on a previous trial of the case, are not sufficient for a continuance of the second trial.

Public excitement in the community and inflammatory newspaper paragraphs are not good grounds for a continuance, unless shown, by

CRIMINAL LAW —*Continued.*

TRIAL.

means of improper influences, to be such as to intimidate or swerve the jury. *The State vs. Thomas J. Ford et als., p.* 443.

An accused who, on arraignment, pleads guilty of the charge preferred against him, may be allowed to withdraw his plea of "guilty" and to plead "not guilty." But the request to make the change must be made within reasonable time, and the discretion of the trial judge in refusing the request will not be disturbed on appeal unless the ruling be glaringly unjust.

The ruling of the judge will be affirmed when nineteen days have elapsed between the date of the arraignment and that of filing the motion for a change of plea, and when the jury for the term had in the meantime been discharged.

The State vs. A. Delahoussaye, p. 551.

A continuance on the ground of absent witnesses may be properly refused when the facts expected to be proved are so vaguely and indefinitely stated as not to exhibit their character or materiality.

After one motion for a continuance has been tried, submitted and decided, the court is not bound to entertain a second motion on the same ground merely differently stated.

The State vs. J. W. Redmond, p. 774.

In a capital case the action of the district judge who orders the trial of an accused on the same day that he is arraigned, in the unforeseen absence of his chosen and retained counsel, and refuses to attorneys appointed to him by the Court more than three hours' time to prepare their defense, is erroneous in law and unjust to the accused.

Under such circumstances, his refusal to postpone the trial for two judicial days will be reversed on appeal, ane the case remanded for another trial. *The State vs. D. Boyd.*

Granting continuances of criminal cases is uniformly held to rest in the sound discretion of the trial judge and his ruling will not lightly be disturbed.

A plea of insanity, the last resort of imperilled criminals, will surely not be listened to when the defendant's own witnesses disprove it.

The State vs. W. George, p. 786.

Affidavit for continuance which does not aver inability to prove the facts referred to otherwise than by the witnesses of whose absence complaint is made, if defective, and the refusal of the continuance is not error. *The State us. Cy. Landrum, p.* 799.

CRIMINAL LAW—*Continued.*

TRIAL.

A prisoner who for want of a safe jail in the parish, is confined in the jail of an adjoining parish, remains in the legal custody of the sheriff and subject to the jurisdiction of the court of the parish where he is under prosecution, and service on him of notice of trial and list of jurors by sheriff of the latter parish, though made at the jail in another parish, is a sufficient compliance with R. S. Sec. 992.

When after three jurors are empanelled, accused for the first time objects that the list had not been called in regular order, and when, thereafter, the names are so called as required, no ground of complaint exists.

After trial begun and jury partially empanelled accused cannot obstruct progress of trial by requiring attachments for absent jurors.

The State vs. G. Washington, p. 828.

VERDICT.

A verdict may be received and entered on record on Sunday, because the proceeding is a mere ministerial act. A verdict thus rendered and received, when it appears that the case had been given to the jury before midnight on Saturday, is not bad or invalid because it was received on Sunday.

The State vs. Thos. J. Ford et als., p. 443.

Where, in a criminal case, the jury, after retiring to deliberate on their verdict, return into court and request the judge for certain information not pertaining to the evidence adduced on the trial, and the counsel for the accused, present, consents that the information may be given, and it is given, accompanied by a statement of the judge that it has nothing to do with the case, which must be determined by the evidence heard on the trial; such irregularity, under these circumstances, is not sufficient to vitiate the verdict.

The State vs. J. Minan, p. 526.

The verdict of a jury in a criminal trial need not be written.

We have no code of practice for criminal causes but follow the common-law procedure in them, and written verdicts are unknown to that system. Verdicts in criminal trials are delivered by the foreman of the jury *ore tenus*, and are recorded by the clerk.

The State vs. P. Simon, p. 569.

A verdict of "guilty of burglary and larceny" is equivalent to a verdict of "guilty as charged in the indictment," and is good as a

CRIMINAL LAW—*Continued.*

VERDICT.

verdict of burglary in the particular manner charged. Had the verdict been for larceny alone, or had the sentence imposed penalties for both offenses, different questions might arise.

The State vs. W. Nicholls, p. 779.

A conviction for inflicting a wound less than mayhem is not responsive to the charge in an indictment of cutting with intent to murder. The variance between the charge and the verdict is fatal.

The State vs. A. Day, p. 185.

DAMAGES.

Where a city ordinance has been received in evidence without objection, none will be heard in the appellate court.

No one can rightfully obstruct a sidewalk under a plea either of convenience or necessity except for such time as is actually needful to get his goods in and out of his store. The public is entitled to free passage over every part of the sidewalk, and whoever obstructs this passage is responsible, not alone for the penalties imposed by the city ordinances but for ulterior consequences as well.

It is neither legal excuses nor palliation that others obstruct the sidewalks in like manner, nor that the general habit of shop keepers is to do likewise. *Widow McCloughry vs. John C. Finney, p.* 27.

Creditors who intervene in bankruptcy proceedings, and who *bona fide* recommend the appointment of a provisional syndic, cannot be held in damages, in the absence of averment and proof of malice on their part. *A. Louque vs. A. Drez et als., p.* 84.

The responsibility of the father for the damage occasioned by the act of his minor child residing with him, is not affected by the fact that he was momentarily absent from the house at the time of the act.

Neither is it affected by the tender age of the minor. The fault, although not legally imputable to the child by reason of his lack of capacity, is imputed by the law itself to the father, as resulting from some defect of care, watchfulness and discipline in the exercise of the paternal authority.

In estimating damages, we must be guided by the evidence in the record. Where the verdict of the jury is not manifestly excessive, and where we can feel no certainty that any modification thereof, would come nearer exact retribution, we are not justified in disturbing it. *James Mullins vs. Peter Blaise, p.* 92.

Under a consolidation of two railroad companies, the corporation thus formed is alone responsible for all damages resulting from acts

DAMAGES—*Continued.*

committed or works made since the act of consolidation, although the road bed alleged to have caused the damages claimed, was the property of, and had been begun by, one of the companies which went into consolidation.

Hence the New Orleans Pacific Railway Company cannot be held in damages alleged to have resulted from works made by the consolidated company, after the 20th of June, 1881, at which time it was merged into the Texas and Pacific Railway Company.

Sallie C. Day vs. N. O. Pacific R. R. Co., p. 131.

In a suit for damages for malicious prosecution of a civil suit, and for a wrongful provisional seizure, the first ground of action will be disregarded in absence of proof of malice and want of probable cause. The judgment dissolving the writ is *res judicata* as to its wrongful issuance, and establishes liability for actual damages.

Where alleged injury to credit and resultant losses appear attributable to the suit itself and not to the seizure, they will not be allowed as damages for the wrongful issuance of the latter.

The counsel fees, allowable as damages for the wrongful issuance of conservative writs, are not those incurred for the defense of the suit, but only those rendered exclusively in relation to the writ.

G. H. Crétin vs. D. Levy, p. 182.

This being an action for damages for an aggravated and causeless assault upon a diseased and helpless man, attended with every circumstance of insult, violence and humiliation, no serious question arises except as to *quantum* of damages. No rule exists by which to estimate the precise pecuniary indemnity which will compensate for such injury; and the verdict of the jury, not being manifestly excessive, will not be disturbed.

H. S. Armstrong vs. D. Jackson, p. 219.

An action in damages for a breach of promise of marriage is maintainable under the laws of Louisiana; such a promise is a legal contract, for the violation of which an action in damages will lie. The woman who sues for damages in such a case, cannot cumulate with her main action a prayer for the recognition of the defendant as the father of the child, the birth of which resulted from the alleged seduction of the mother by the defendant, under the cover of the promise of marriage, or for alimony for the support of the child—such demands must be enforced in separate suits.

In a suit for damages by a woman for breach of promise, proof of her seduction is admissible to enhance or increase damages.

Prescription of one year, which applies to damages *ex delicto*, cannot

DAMAGES—*Continued.*

apply to an action for breach of promise, as such damages would arise *ex contractu.*

Minority of the defendant cannot be considered as an element of defense if not pleaded *in limine*, and when suggested for the first time in the Supreme Court.

In the absence of any averment of justification of the breach of promise, and under the issue of a general denial, evidence to show the lewd and unchaste habits of the plaintiff is inadmissible. What is not alleged cannot be proved.

In such cases the verdict of the jury will not be disturbed on appeal, unless manifestly erroneous and glaringly unjust.

Margaret Smith vs. H. J. Braun, p. 225.

A car driver can be charged justly with negligence only where he fails to observe or do something he ought to see or do, and would notice or do with ordinary vigilance; where he fails to be prepared for something visible, or at least of probable occurrence, or that might be reasonably expected of him.

If the accident happen from a sudden and unanticipated act, which is the result of the thoughtless impulse of a child, of which human foresight could not be prescient, no liability attaches to the driver or his employer.

J. D. Gallaher vs. Crescent City R. R. Co., p. 288.

The driver of a feed car, running on one of the streets of the city, allowed boys to ride by his side on the platform, fare free. On their getting troublesome, he ordered them to get off, slackening his car to a mule walk, without touching, throwing off or threatening either. One pushed another, who, losing his balance, fell, slipping under and being crushed by the vehicle, death ensuing later.

Under such circumstances the company cannot be held liable. The injury was not the natural and probable result of the driver's orders and such an occurrence as he might and ought to have reasonably foreseen. It was the consequence of one for whose acts the company is not responsible, and who, like the injured party, was an intruder on the car.

Harry Lott and wife vs. N. O. City and Lake R. R. Co., p. 337.

In a suit for damages against a justice of the peace, the petition, which charges that the magistrate rendered a judgment beyond the scope of his authority or jurisdiction, based on malicious and oppressive motives, is not amenable to the exception of no cause of action.

In order to claim immunity from an action in damages for error in

DAMAGES—*Continued.*

judgment, the justice of the peace must not only show that he had jurisdiction of the matter in which he rendered judgment, but also, that he acted within his jurisdiction.

D. Estopinal vs. M. A. Peyroux et al., p. 477.

In a suit on an attachment bond for damages alleged to be caused by the attachment, which had been dissolved, the plaintiff is not entitled to recover all the costs and expenses incurred in the suit, but only such as resulted directly from the writ. So the counsel fee for defending the suit on its merits cannot be charged against the plaintiff in attachment, but only a fee for services directed exclusively to procuring a dissolution of the writ.

Adam Brothers vs. Gomila & Co. et al., p. 479.

The doctrine of non-liability of master to servant for injury resulting from fault of fellow-servant applies only when the fellow-servant's fault is the sole cause; but where the injury is attributable only partly to the fellow-servant's negligence and partly to the failure of the company to provide proper and suitable apparatus, the negligence will not exonerate the company from liability for its own fault.

While a railroad company is not the insurer of its employes and is not bound to provide the best possible means and appliances, it is bound to exercise reasonable and ordinary care to provide such suitable and safe apparatus as common experience shows to be proper in order to avoid exposing their employes to unnecessary danger.

A principal, if not the main, object of the *buffers* or *draw-heads*, usually attached to cars, is to prevent collision of cars in coupling and thereby to protect the brakemen who are compelled to stand between the cars in coupling.

Such provision is so ordinary and essential that their omission would be inexcusable negligence. Yet the use of cars of such unequal height that the buffers are inoperative, is more dangerous, because the defect is less observable.

In general freight trains, where the cars of many different companies are congregated under the necessities of through freight, it may be that, as there is no law compelling all companies to use cars of the same height and construction, the company might be excusable for using cars of unequal height; but in a construction train and where the cars all belong to one company itself and where the

DAMAGES—*Continued*

above excuse is inoperative, the construction and use of such cars is certainly negligence.

The death of the decedent in this case was caused by the failure of the company to place on its cars buffers, which would accomplish the purpose for which they were designed; and, there being no fault on decedent's part and no assumption of such a risk, and no valid excuse for the company's negligence, the company is liable.

B. Towns and Wife vs. Vicksburg, S. and P. R. R. Co., p. 630.

As a rule, an action in damages for false arrest and imprisonment is premature, unless the suit in which the writ issued has terminated. This is not so, however, where the order dissolving the arrest, has, before final judgment on the merits, been affirmed on appeal and the judgment thus rendered has become final.

A party illegally arrested, even without malice and with probable cause, is entitled to recover actual damages.

E. Wentz vs. G. F. Bernhardt, p. 636.

It is negligence in a railroad company to have a station platform higher than the steps of passenger coaches, and to require in consequence, that passengers should enter from the platform into a baggage car, and thence proceed to the coach or coaches assigned to passengers. The company is liable in damages for injuries received by passengers while they are seeking to board a train in that manner at the request of the conductor.

Mrs. Turner vs. Vicksburg, S. and P. R. R. Co., p. 648.

Recovery of damages for the death of a freeman, caused by an accident occurring before the passage of the Act of July 10, 1884, cannot be had in the face of the uniform jurisprudence forbidding it.

A railway company is responsible in damages for an accident caused by an imperfect and unsafe bridge to an engineer of the company although the road was in course of construction and not yet open for traffic or travel and although the bridges while the road is constructing are not required to be as perfect as when finished for traffic and travel. They must be sufficient not to needlessly endanger the lives or limbs of the employes while the road is in its unfinished state.

The defence that a railway company is not responsible for accidents occurring in the absence of its governing officers cannot be listened to. Such doctrine would be tantamount to relieving the company of all responsibility. The company is present in the person of the conductor of the train, or such employe as is operating it.

DAMAGES—*Continued.*

The doctrine of fellow-service releasing a railway company from liability for injuries, because the servant injured is fellow with the servant through whose fault the injury was suffered, is modified, and it is now established that a conductor of a train represents the company for the time and is the master of the engineer who is obliged to obey his orders.

It is error to charge the jury that although damages for the death of a person caused by a railroad before July 10, 1884, are not recoverable, yet they are recoverable for the loss of support by the deceased, because that is the direct consequence of the death.

M. Van Amburg vs. Vicksburg, S. & P. R. R. Co., p. 650.

An action for damages for a passive violation of a contract must be preceded by a putting in default of the debtor; and such putting *in mora* must be alleged in order to justify the introduction of testimony on the question of damages.

An allegation that the debtor was put in default by means of a formal demand on him for the damages claimed, does not conform with the modes provided by the Civil Code—and is not legally sufficient to admit testimony of damages.

J. M. Deffee vs. C. D. Covington, p. 659.

Where proceedings for a *cessio bonorum* have been taken by insolvents which are opposed by some of their creditors on the ground of fraud, and the insolvents have reconvened for damages because of the injury caused by the charge of fraud, and the jury find for the insolvents but reject their demand for damages and they alone appeal, the creditors cannot obtain an inquiry into those charges and a reversal of the judgment below on the principal demand by simply filing in this court a prayer for such reversal. They should have appealed.

Where charges of fraud are made in good faith upon reasonable grounds and without malice and are countenanced by surrounding circumstances and are apparently justified by recent acts of the parties to whom fraud has been imputed, there is no place for a claim for damages for any supposed injury resulting therefrom and the rejection of such claim by a jury will be approved.

Clement Bros. vs. Creditors, p. 692.

Railway carriers are bound to furnish safe modes of passage between their depots and their trains, and at stations where trains pass at night they are bound to furnish proper and sufficient lights to make the way reasonably safe.

DAMAGES—*Continued.*

For injuries resulting from non-performance of these duties they are responsible.

When the negligence of the carrier is established, and is of a character greatly to multiply the chances of the accident which happened, and naturally leading to its occurrence, and when the evidence tends to connect the accident with the negligence, the mere possibility that the accident might have happened even without the negligence will relieve. Courts, in such matters, consider the natural and ordinary connection of events, and will not indulge in fanciful suppositions.

J. A. Reynolds et al. vs. Texas and Pacific R. R. Co., p. 694.

It is the clear duty of a railway carrier to provide safe egress from their cars for their passengers, to give due notice of arrival at stations, to allow passengers proper and sufficient time to alight, and to take care not to start the train while passengers are in the act of getting off. For neglect of such duty, resulting in injury to passengers. the carrier is responsible.

When a passenger, with his wife and children, is in the act of alighting from the train stopped at a station, and when the wife, with an infant in her arms, having reached the lower step of the car, is thrown violently to the ground by the sudden starting of the car, the husband's act in jumping off to her assistance while the train is in motion, and leaving his other children of tender years on the platform, one of whom is injured in attempting to jump off after her parents, is not such contributory negligence as debars recovery for injury to the child. The acts of both the father and child were the direct consequences of defendant's own misconduct, and falls within the well-settled rule that contributory negligence cannot be set up as a defense when such negligence was the result of tremor or excitement produced by the defendant's misconduct, or when the latter puts the plaintiff to the sudden election between the course which he took or submitting to a grave inconvenience

H. Lehman vs. Louisiana Western R. R. Co., p. 705.

Prescription begins to run, not from the building of a railway bed, but from the time damage is caused by it.

A railway company must so build its road-bed as not to impair the drainage of the land over which it passes and must construct necessary cattle-guards and crossings, under penalty of paying damages for injuries caused by its omissions.

The failure to stipulate in the donation of the right of way that cattle-guards and crossings must be provided does not deprive the donor

DAMAGES—*Continued.*

from recovering for injury for want of them. They are incidents of railroad building. The company must build them for its own protection.

C. E. Heath vs. Texas and Pacific R. R. Co., p. 728..

The opinion and decree of this Court in the case of the Crescent City Slaughter-house Co. vs. the City of New Orleans, 33 Ann. 934, was an authoritative judicial decision that Articles 248 and 258 of the Constitution of 1879 were valid and impaired no contract right of said company; that the city of New Orleans had the lawful right, with the concurrence of the Board of Health, to regulate the business of slaughtering within its limits, and to designate places where such business could be conducted, and also, by necessary consequence, that all persons complying with such regulations had the right to pursue said business within such designated limits. This decree was subject to reversal only by a judgment of the Supreme Court of the United States, and until so reversed was binding as absolute law upon the parties thereto.

In prosecuting a subsequent suit in the United States Circuit Court for an injunction to restrain a party complying with the regulations of the city from prosecuting said business at places so designated, which suit had no foundation except in the assumption that the decree of this Court was not law, the defendant corporation acted without probable cause and can find no sanction for its course, either in advice of counsel or in the decision of the Circuit Court sustaining such assumption. The decree of this Court fully advised the parties what was the law, and it was not justified in acting contrary thereto upon any advice whatever.

The record sufficiently establishes that the party in bringing said suit not only acted without probable cause, but was also actuated by legal malice, *i. e.*, by improper motive, being the determination to prolong its enjoyment of a profitable monopoly, without regard to the legal rights of others.

Held, that defendant is liable for damages occasioned to plaintiff, not only by the unlawful issuance of the injunction, but also by the malicious prosecution of the suit.

In regard to the quantum and elements of damage, the contentions of defendant are considered and overruled and judgment affirmed.

Butchers' Union, etc., vs. Crescent City Slaughter-house Co., p. 847.

DEDICATION TO PUBLIC USE.

The dedication of property to public use must appear by evidence so conclusive as to exclude all idea of private ownership.

So where a road has been used by the public for thirty or forty years by the mere sufferance or tolerance of the owners of the land which it traverses, such use does not, of itself, establish the formal assent required to prove a dedication and divest the title of such owners. *J. Torres et al. vs. F. Falgoutt, p.* 497.

DIVORCE.

Where a marriage is dissolved by divorce, the custody of the child or children of the marriage is retained by the party obtaining the divorce, and it is not necessary that such custody should be specially awarded by the judgment.

And, where the wife obtains the divorce, she does not forfeit such custody by marrying again without being continued in the same by the advice of a family meeting.

A tutor or tutrix cannot be appointed to a minor child when both parents are living, though the marriage be dissolved by divorce.

A judgment rendered in chambers in a *habeas corpus* proceeding, instituted by the father of the child after divorce, directed against the mother obtaining the divorce, making her care of the child conditional, cannot be invoked as *res adjudicata* in a subsequent suit where additional issues are involved, when it appears that no cause for the restitution of her authority over or care of the child any longer exists.

L. Lemunier vs. M. McCearly, p. 133.

DONATIONS.

None but creditors and forced heirs can attack the acts of an owner of property fraudulently alienating it.

Article 1754, Civil Code, is applicable only to spouses who have forced heirs; and though the nullity of donations, disguised or made to persons interposed, is absolute, in the sense that they are not reducible merely, but wholly null, it is only *relative* to forced heirs, and cannot be invoked by mere simple collateral heirs.

Bettie Scott vs. M. E. Briscoe, et als., p. 178.

EJECTMENT.

The statute requires that proceedings by a landlord against his tenant for the recovery of possession of leased property shall be summary, and this applies equally to such proceedings in the appellate as in the court of the first instance.

Where an exception had been filed in the City Court and had been maintained, and on appeal the District Court had reversed that

EJECTMENT—*Continued.*

ruling, it was the duty of the latter Court upon such reversal to proceed to hear and determine the merits.

Such appeals are triable by the District Courts in vacation or the summer recess as like cases are triable by those courts in vacation when originating in them.

Pleadings are taken for what they really are and not for what their authors designate them.

The State ex rel. Matt vs. Judge, etc., p. 843.

ESTOPPEL.

A party to a suit is not to be permitted to judicially allege a state of facts so contrary to and inconsistent with those set up in a former suit between the same parties, that if the allegations in the one suit be true, those in the other must necessarily be false.

Mary Walker vs. Alexis Walker, p. 107.

Minors who have attained their majority, or been fully emancipated, and who intervene in an act of mortgage by one who encumbers property once belonging to the succession in which they were heirs, and who therein waive a rank to which they might be entitled for the payment of their share in the partition of the same property, are estopped from afterwards contesting, either the validity of the partition proceedings, or the title of the first adjudicatee, or of subsequent purchasers, particularly of the vendees who have acquired *since* the date of the mortgage act containing their ratification.

Mrs. C. C. Sewall et al. vs. Mrs. P. L. Hebert et als., p. 155.

EVIDENCE.

The holder by transfer of tickets, consisting of paste-boards bearing no date and no promise to pay, but figures calling for an amount of money, issued to plantation laborers for labor, issued by one of the partners without the knowedge or consent of his co-partner, cannot recover against the latter, in default of proof of actual indebtedness by the partnership to such of his transferrers, and of a *bona fide* transfer from the original creditor to him.

Labor tickets, thus issued, are not written evidences of indebtedness, binding on the alleged debtor, and the indebtedness of the planter must be proved by competent evidence.

L. D. Dalcour vs. C. P. McCan et al., p. 7.

Article 2281 of the R. C. C. making parties interested competent witnesses in their own behalf, leaves to the court the appreciation of their testimony, as much as it does that of disinterested witnesses.

EVIDENCE—*Continued.*

The testimony of a plaintiff, in his own favor, to establish a large claim against a succession, should be received with the greatest caution. It is, in itself, of the weakest character and unless strongly corroborated, cannot serve as a basis for a judgment of recovery. Under Art. 2282, R. C. C., the circumstance of his being a party may diminish the extent of his credibility.

A. S. Culter vs. Succession of G. W. Collins, p. 95.

Evidence offered on the trial of a suit by one of the heirs of a succession against the surviving widow of the deceased, for the purpose of compelling her to include in the inventory, property which she claimed as part of her separate estate, is inadmissible as evidence on the trial of an issue growing out of an opposition to her account of administration for the rejection of a moneyed claim for her paraphernal rights against the community.

The ruling of the district judge, ordering the testimony of a party to the suit to be stricken out of the record, for the reason that such party refuses or fails to appear in court for the cross-examination, is within his legal discretion, and will not be disturbed on appeal.

Succession of Felix Rieger, p. 104.

In the absence of a specific averment of error, fraud, ambiguity, or the like, oral testimony is inadmissible to contradict, vary, restrict, or enlarge an authentic act. In the absence of an averment that time was granted *since* the date of such act and in the face of one to the effect that time was agreed to, *previous* thereto, oral testimony can not be received.

It is especially inadmissible to show that the consideration of a mortgage given to secure the payment of a note issued for value received in advances made, and which is acknowledged in the act as an indebtedness—was not the consideration of the act; but that the consideration was the granting of time for the payment of the mortgager's debt, and the promise of the mortgagee to furnish supplies to work the mortgaged land.

Charles Vial vs. J. G. Moll, et al., p. 203.

Where the written titles to land have been destroyed by the burning of the public records parol evidence of the contents of the burnt deeds is receivable.

Where a title deed expresses a certain frontage as so many arpents, it cannot be stretched beyond it when such frontage by the depth expressed gives all the land claimed in the deed.

M. M. A. Lane vs. R. S. Cameron, p. 250.

EVIDENCE—*Continued.*

Parol proof is admissible of the acts of one pretending to rights under a written agreement to sell real estate for the purpose of showing that such acts are inconsistent with and repugnant to a claim of ownership under such agreement, and that they repel the reality of such claim and demonstrate the fraudulent pretension set up at a late day, of ownership or of rights to ownership under such agreement.

N. T. Edson vs. M. McGraw et al., p. 294.

To prove a contract exceeding five hundred dollars in value, a credible witness and corroborating circumstances are required. The fact that the only witness to prove it, is the party claiming rights under it, is not sufficient to make him incompetent; but it may diminish his credibility. When such testimony is unaccompanied by corroborating circumstances, it is surely insufficient to prove the contract.

The State ex rel. Carl vs. Judge, etc., p. 380.

A verdict of a jury on questions of fact as to which the testimony is directly conflicting will not be disturbed unless manifestly insupportable.

S. Marx vs. L. D. Allen, Jr., p. 655.

Although the burden may be on defendant who avers a compromise, a case will be remanded for further evidence where, the ends of justice requiring it, the proof is seemingly incomplete, and plaintiff has offered to disprove authority claimed to have been by him delegated.

J. Chaffe, Adm. vs. F. P. Stubbs, et als., p. 656.

A contract for over five hundred dollars may be proved by one witness and corroborating circumstances. Where the contract was to pay two thousand dollars for exclusive and undivided attention to a childless woman of large property who was apparently sinking and had made no will and ardently desired to make one, the intensity of her desire to gain time and strength to make a will and the large property at her disposal, and the fact that the physician gave his undivided attention as the contract required, are corroborating circumstances sufficient to support the oath of one witness and establish the contract.

Where one declares upon a contract he cannot recover upon a *quantum meruit*, but while testimony of value of services is inadmissible under the contract, it is admissible to show the reasonableness of the contract and that it is one likely to be made under the circum-

EVIDENCE—*Continued.*

stances. The contract must first be proved, and then its reasonableness may be shown by proof that it was not grinding but fair.

The correct repetition of conversations is the most difficult feat of memory and of expression, and therefore the narration by a witness of the conversation of a dead person is the weakest of all evidence. The promise of a dead person to pay the debt of another cannot be proved by parol.

Succession of Charlotte Piffet, p. 871.

EXECUTORY PROCESS.

The heirs of the wife, upon her death, become joint owners with the surviving husband of the community property; but it is not necessary that such heirs of the succession of their mother should be made parties to a proceeding to foreclose a mortgage upon the property contracted during the existence of the community.

They cannot, however, be divested of their title to one-half of community lands by a sale of the same under executory process instituted after the death of their parents and directed against them as minor heirs of their father to pay a community debt, where they were represented in the proceedings by a *tutor ad hoc* who never qualified by taking the prescribed oath. Where what seems to be the entire record of the executory proceeding is in the transcript of appeal and no oath of the *tutor ad hoc* appears therein, the case will be remanded to enable the party interested to supply the required proof, if it exists.

T. M. Killelea vs. L. F. Barrett et al., p. 865.

EXECUTORS, ADMINISTRATORS, TUTORS, ETC.

Succession representatives and tutors who are not surviving partners in community or ordinary partnership, or legatees, or heirs, are absolutely prohibited from purchasing any property entrusted to their administration. The fact that they are mortgage creditors does not form an exception in their favor. The prohibition, which derives from the Roman law, extends to all purchases, whether the sale was provoked by the succession representative or by a creditor, whether in, or out of, the *mortuaria* proceedings. Under the express letter of the prohibitory laws, the purchases are reprobated and are absolute nullities, whether made directly or by means of a third or interposed person, whether for good or improper motives.

Succession of Josiah Stanbrough, p. 275.

An executor is, in effect, but the mandatory of the testator touching the disposition of the will. He must, in the exercise of his func-

EXECUTORS, ADMINISTRATORS, TUTORS, ETC.—*Continued.*

tions thereunder, conform to its terms and directions. So, where he is instructed to pay a stipulated sum to any asylum he may select, "especially devoted to the care of aged persons," he is not authorized to give it to an asylum devoted, by the terms of its charter, "to the relief of destitute females and helpless children,' and cannot be compelled to do so.

Succession of Colin J. Nicholson, p. 346.

The proceeding by *rule*, to know whether an executor has funds, to call for a true statement of his accounts and his bank book, and to mulct him with interest for any sum for which he may be responsible and does not faithfully account, as also to dismiss him from office, is expressly authorized by Section 8, or 1464 of the R. S., and Article 1151 of the R. C. C., which are all couched in the same terms. *Succession of Kate Townsend, p.* 405.

EXPROPRIATION.

Where the law requires that the charter of a corporation must declare "the time when and the manner in which payments on stock subscribed shall be made," held that, where the charter declares "that the stock shall be paid in cash at such times and such amounts and with such notices to the subscribers as the managers and directors shall deem best for all parties in interest," it is a substantial compliance with the law. In an expropriation proceeding where the land sought to be expropriated extends through more than one judicial district, the suit must be brought in the district in which the owner has his domicile.

The map or plan required to accompany the petition for expropriation, which in connection with the petition gives intelligible information respecting the locus and condition of the land sought to be expropriated, complies with legal requirements.

Where a proceeding for expropriation is directed against the owner of the soil to secure a sufficiency of land for a telegraph line, and a company intervenes and claims that the owner has already conveyed to it (the intervening company) the entire space of telegraph purposes sought to be expropriated for like purposes, but alleges no special injury to itself from the expropriation, or that the land occupied by it (the intervening company) is insufficient for both lines of telegraph, held that no cause is shown by the intervenor.

Where a telegraph company seeks to secure by an expropriation a sufficiency of the right of way of a railroad to construct its line of

EXPTOPRIATION—*Continued.*

telepraph, and another telegraph company seeks to exclude the first company from such right of way of the railroad on the ground that it is entitled to the entire right of way under a contract with the railroad company, such a claim can only be urged on the theory that such opposing company possesses the exclusive right to the land against which the proceeding for expropriation is directed.

Telegraph Company vs. Morgan's R. R. Co., p. 883.

FUTURES.

1. Sales of property for future delivery, with the *bona fide* intention and obligation to make actual delivery, are lawful contracts; but if, under the form of such a contract, the real intent be merely to speculate on the rise or fall of prices, and the goods are not to be delivered, but the contract to be settled on the basis of differences of price, the transaction is a wager and is non-actionable.
2. But in order to affect the contract, the alleged illegal intent must have been mutual, and such intent in one party, not concurred in by the other will not avail.
3. The law presumes lawful purpose until the contrary is proved; and when one party charges illegal intent, the burden of proof is impossd upon him.
4. The validity of the contract depends upon the state of things existing at its date, and is not affected by subsequent agreements under which the parties voluntarily assent to a settlement on the basis of differences.
5. The mere fact that at the date of his contract, the vendor had not the goods, and had made no arrangement for obtaining them and had no expectation of receiving them unless by subsequent purchase, does not suffice to impair the contract. The contrary doctrine, once announced, is now thoroughly overruled.
6. It follows that the failure to identify the particular goods sold does not affect the matter, because the sale is not of ascertained articles, but of articles of a designated kind and quantity to be selected thereafter, which is a lawful contract, when the obligations are reciprocal.

Applying the foregoing principles to the facts of this case, which is a contract for the future delivery of cotton under the rules of the Cotton Exchange of New Orleans, the defense of wagering is not sustained.

Conner & Hare vs. G. M. Robertson, p. 814.

HABEAS CORPUS.

In an application for a writ of *habeas corpus*, based on the alleged want of jurisdiction of a court to take cognizance of a charge of grand larceny—the affidavit charging that the crime was committed within the jurisdiction of the court; and the fact that alleged stolen goods were found in the possession of the accused, will be considered as showing *prima facie* jurisdiction in the court, thus throwing the burden of proving the reverse on the relator.

The State ex rel. Edwards et al. vs. Criminal Sheriff, p. 617.

HOMESTEAD.

Where a mortgage has been given for the loan of money by two co-proprietors of land, and one afterwards buys the other's undivided half of it, he cannot successfully set up a right of homestead upon the land against or in derogation of the mortgage.

And this the more when he has assumed the payment of his co-owner's half of the mortgage-note as a part of the purchase price, since the homestead right is not pleadable against the vendor's lien.

N. Soulier vs. Benker, sheriff, et al., p. 162.

In an appeal from a judgment in an injunction suit, involving the debtor's claim of a homestead under the act of 1865, previous to the recent amendments of the Constitution, the test of the jurisdiction of the Supreme Court was in the value of the property claimed as a homestead, and not in the amount of the judgment enjoined.

Homestead exemptions being in derogation of common right, parties claiming thereunder must show by clear proof that they fill all the requirements of the law conferring such exemptions.

A short residence on the property, with a view to claim it as a homestead, but abandoned before the seizure, will not be sufficient.

Virginia Bossier vs. Raynes, sheriff, et als., p. 263.

The homestead exemption provided for in the Constitution, Articles 219 and 220, do not apply to a judgment rendered against a party for moneys or property misappropriated by an agent in the discharge of a trust bestowed on him by his principal. Such a debt is held to have been incurred by the agent as a fiduciary.

In such cases, damages will be allowed to the seizing creditor whose judgment has been enjoined in the enforcement of a homestead exemption. *H. F. Bridewell vs. G. V. Halliday et als.*, p. 410.

The occupants of a homestead have the same right to travel and sojourn in other places for temporary purposes of health, business or pleasure that other citizens have; and so long as such privilege is exercised in good faith, within reasonable limits and without intention to change or abandon the home, but with the fixed and certain intention of returning thereto, the homestead exemption is not affected thereby.

H. S. Burch vs. Mouton, sheriff, et al., p. 725.

HUSBAND AND WIFE.

Article 138 of the Civil Code relative to separation from bed and board remains in force and was not repealed by Act 76 of 1870 and Act 122 of extra session of 1870.

A. Blanchard vs. H. Baillieux, p. 127.

A wife separated in property from her husband is a third person with respect to all sales and contracts made by the husband in which she does not join. *Mrs. L. Coleman vs. F. H. Coleman, p.* 566.

INJUNCTION.

The test of the right to dissolve an injunction on bond is the nature and extent of the injury wrought by the injunction. If irreparable, that is if not compensable by money, dissolution on bond is not permissible. If reparable, the injunction may be dissolved on bond.

Where the injunction forbids the taking possession of an office or the exercise of its functions, no difference exists *quoad* the right to dissolve between that and the ordinary objects of injunction.

The State ex rel. Segura vs. Judge, etc., p. 110.

As a rule, injunctions should not be dissolved, unless contradictorily. The rule, however, admits in extreme cases, of some exceptions.

Where an injunction, granted to prevent an act the commission of which would inflict irreparable injury, is dissolved, at chambers, *ex parte* and on bond, notice of such dissolution should be given to the plaintiff in injunction.

In the absence of such notice of dissolution, the plaintiff is entitled to a suspensive appeal from the dissolving order and, if the same be asked within ten days after knowledge is acquired of the existence of such order.

A suspensive appeal lies from such order, where the act enjoined was the sale of succession property, as such sale might cause irremediable wrong.

The State ex rel. John T. Moore, Jr., & Co. vs. Judge, etc., p. 118.

A suspensive appeal does not lie from an interlocutory decree dissolving an injunction, where the dissolution is permissive only of an act, the commission of which cannot cause any irreparable injury.

The effect of the dissolution of an injunction issued against an actual possessor of real estate, to prevent him from collecting the rents thereof, is to place the parties in the condition which they occupied before the writ asked was allowed.

The injury resulting to plaintiff—should he finally succeed in his petitory action—could be ascertained, computed and liquidated into dollars and cents. Such injury is nor irreparable.

W. B. Schmidt vs. F. E. Foucher et al., p. 174.

INJUNCTION—*Continued.*

A sheriff, who is a nominal party to an injunction proceeding to prevent a sale of property under *fi. fa.* and against whom no personal judgment is sought, has no right to set up defenses which the party enjoined, or the alleged transferree of his rights, alone could raise.

J. Chaffe & Sons vs. Elliott, Sheriff, et al., p. 184.

An injunction is not the appropriate remedy to prevent a police jury from employing an attorney in its suit, even where the law provides that the District Attorney shall represent it in such suits —the less so, where the latter claims for himself exclusively the salary allowed to the employed attorney, who is not made a party to the action. *G. Lèche vs. Police Jury et al., p.* 195.

Want of consideration is not one of the causes for which an injunction can be obtained without bond, under Art. 739, C. P.

Objections to the legality of the issuance of such injunction without bond, can be formulated, either in a rule to dissolve, or in an exception, and urged at the time of offering the oral testimony, on the trial of the rule or exception.

An answer filed under *reserve* of such exception cannot be considered as a waiver of the preliminary defense. It joins issue on the merits only, if the exception is overruled.

In the absence of legal proof in support of the averments, a judgment of *non suit* is the proper one to be rendered.

Charles Vial vs. J. G. Moll et al., p. 203.

It is an essential condition precedent for the recovery of damages on a bond furnished for an injunction, that the injunction be decided to have been wrongfully obtained.

A judgment which recognizes that an injunction was properly sued out and which dissolves it, owing to the happening of events subsequently occurring, is not one deciding that the injunction was wrongfully obtained and cannot serve as a foundation for a claim in damages.

Butchers' Union and Slaughter-house Co., vs. S. Howell, p. 280.

In the exercise of its plenary powers of control and general supervision over inferior courts under Article 90 of the Constitution, this Court can issue the conservatory writs therein mentioned, as well as in appealable as in unappealable cases, in which other courts would be impotent to afford relief.

An order dissolving an injunction on bond, should not be rescinded *ex parte.* The proceeding to revoke it should be carried on contradictorily. A decree *proprio motu*, setting it aside, without hearing, is irregular and void.

The State ex rel. N. O. Gaslight Co. vs. Judge, etc., p. 285.

INJUNCTION—*Continued.*

A *mandamus* does not lie to compel the granting of an injunction, where the averments of the petition show that, if allowed, it would, or might, clash with another injunction issued by another court, apparently first seized of jurisdiction over the same matter, in a litigation between the same parties.

The State ex rel. N. O. Gaslight Co. vs. Judge, etc., p. 400.

A bond given in an injunction suit in the U. S. Chancery court, conditioned that the obligors will pay such damages as the party aggrieved may recover against them, can be sued on in our State Court before any recovery has been had, and for the purpose of effecting the recovery for which the bond provided.

Counsel fees for obtaining the disposition of the injunction are an element of damage in our practice in suits upon such bonds, and are recoverable therein. Therefore an exception of no cause of action, based upon the non-recoverability of such damage in an action upon the bond will not be sustained.

C. M. Aiken et al. vs. T. P. Leathers et als., p. 482.

In cases not falling within those specially provided for in the Code of Practice, or other statute, as proper for the issuance of injunctions, but based on the general discretion vested in judges by Art. 303, to grant injunctions when necessary to prevent any injurious act, the application is addressed to the sound and legal discretion of the judge; and his refusal to grant a preliminary injunction will not be disturbed on appeal to this Court, unless we are clearly convinced that he has committed evident error. In this case we think his discretion was wisely exercised.

New Orleans vs. Telephone and Telegraph Co., p. 571.

Where an injunction suit is submitted on a rule to dissolve and on the merits, and a judgment is rendered dissolving the injunction, with damages, which judgment is responsive to the issues on both the rule and the merits, and where, on appeal to the Circuit Court, the latter affirms the judgment, this Court, on application for *certiorari* and *mandamus*, will not look into the reasons assigned by the district judge and the appellate judges respectively, and interfere on the ground that the former based his judgment on the merits, while the latter based their affirmance on the grounds of the rule to dissolve. The proceedings being regular and the jurisdiction undisputed, we are not concerned with the sufficiency or correctness of the reasons of the judgment.

The State ex rel. Poydras Planting Co. vs. Judges, etc., p. 582.

INJUNCTION—*Continued.*

For the reasons given in State *ex rel.* Bell vs. Judge, 36 Ann. 886, the order dissolving the injunction herein appealed from is annulled and set aside. *Mrs. J. R. Bell vs. Riggs & Bro., p.* 813.

In the matter of ordinary preliminary injunctions, the function of fixing the amount of the bond required is confided by law to the discretion of the judge before whom the action is pending.

While this discretion is legal and not arbitrary, and while we might afford relief in cases of oppressive and unreasonable requirements amounting to a denial of justice, yet where the amount fixed is supported by evidence or otherwise evinces a prudent and sincere exercise of his legal discretion, we are not justified in criticising his order and substituting our discretion for that which the law attributes to him alone.

Mrs. J. R. Bell vs. Riggs & Bro., p. 813.

A suspensive appeal does not lie from an interlocutory decree dissolv ing an injunction on bond, unless it appears that the act prohibited would work an irreparable injury to the plaintiff.

When the plaintiff in injunction has failed to allege any p rsonal injury to flow from the act complained of, it is safe to conclude that he could not suffer irreparable injury from the interlocutory order dissolving his injunction on bond.

A district judge who allows an injunction to be dissolved on bond, because the act complained of would not work irreparable injury to the plaintiff, should consistently refuse a suspensive appeal from his dissolving order, as the latter only applies when the interlocutory decree would cause irreparable injury.

The State ex rel. Sterken vs. Judges, etc., p. 825.

The inferior court, whose judgment is appealed from, retains jurisdiction to determine primarily the character and effect of the appeal taken.

A suspensive appeal taken from an order dissolving on bond an injunction issued to prevent the commission of acts which, if done, would cause an irreparable injury, places matters in the condition in which they stood before the motion to bond was made, and in which they would have continued, had not such motion been filed. In other words: the effect of the appeal was to maintain the injunction in force. 33, Ann. 438, affirmed.

The district judge had authority to find and to punish transgressors for contempt.

The State ex rel. Barthet et al. vs. Houston, Judge, p. 852.

INSOLVENCY.

Under the law of Louisiana, a contract of sale is perfect, as between the parties, from the moment of valid agreement and operates to vest the property in the vendee even though there has been no delivery.

Although, in the absence of the delivery, such sales are without effect as against seizing or attaching creditors of the vendor and his *bona fide* transferrees in possession and without notice, the vendee's title is not affected by the vendor's mere surrender in insolvency to his creditors. Such surrender only passes property belonging to the insolvent, and the syndic takes only the right which the insolvent himself had. The syndic and the creditors have not seized or attached the property, and are not transferrees within the sense of the law. *A. G. Nicolopulo vs. His Creditors, p.* 472.

Where an agent, entrusted with bonds belonging to his principal, used them without the owner's authority and substituted in their place other securities, and the owner, when hearing of the transaction, ratified it, *held* that the syndic of the agent who had become insolvent could not complain of the transaction or recover the substituted securities.

A fair exchange of values may be made at any time without breach of any prohibition of the insolvent laws.

The ratification, though made after failure and within three months preceding the surrender, retroacted in its effect so as to make the transaction valid *ab initio*; and, inasmuch as the exchange would have been lawful if it had been made at the date of the ratification, no rights of creditors had intervened authorizing them to object to its retroactive effect.

Even independent of the effect of ratification, the rights of the holder to retain the substituted securities, would be maintained under the doctrine that when the agent, holding for safe keeping the property of his principal, converts it into different property by exchange or otherwise, the latter, remaining capable of identification, will be subject to the rights of the original owner.

J. M. Seixas, Syndic, vs. Mrs. R. Brugier, p. 509.

A mortgage granted by a debtor in favor of one of his creditors, in order to secure an antecedent debt and with the intention of unduly benefiting him, within three months next preceding his failure, is an unjust preference under Section 1808, Revised Statutes, although the state of his insolvency was not then known to the creditor, and although the latter was in good faith.

INSOLVENCY—*Continued.*

The clear object of the law is to secure a perfect equality among the creditors of an insolvent debtor whose property is the common pledge of all his creditors.

J. W. Black, Syndic, vs. J. P. Richardson & Co., p. 594.

A judgment rendered homologating an account and ordering a distribution of funds, is a nullity where the cession of property previously ordered by the court has been avoided and set aside.

F. K. Philips vs. Creditors, p. 701.

INSURANCE.

In an action on a policy of insurance, the act of the insurer who has knowledge of an increase of risk by a change of use of the insured premises, without objecting to the same or cancelling the policy, will be construed as a waiver of his right of forfeiture of the contract by reason of such increase of risk.

Párol testimony is inadmissible to show such waiver, although the policy contained a clause requiring the agreement of the insurer to be endorsed on the policy.

If the insurer, after knowledge of the increase of risk, continues to receive premiums, he will be held to have waived the forfeiture.

Positive testimony on a given point must predominate over negative testimony on the same point.

B. S. Story vs. Hope Insurance Co., p. 254.

JURISDICTION.

In a revocatory action the jurisdiction of this Court is determined not by the value of the property, the sale of which is sought to be annulled, but by the amount of the creditor's demand, exclusive of interest.

Moses Schwartz vs. W. B. Schmidt, et als., p. 41.

The supreme Courth as jurisdiction over a suit for a toll which is resisted as unwarranted by law, or illegal, whatever be the amount claimed.

The constitution in force, as well as that of 1868, have brought a change in that of 1852, which was that considered in 9 Ann., p. 65. The court could not then pass on the legality of such toll, where the amount of it did not exceed $300, which was then the lower limit of its jurisdiction. The court can now do so, regardless of the amount claimed, under Art. 81 of the Constitution.

The exception of the capacity of plaintiff to sue, cannot be considered on a motion "to dismiss for want of jurisdiction."

The court will allow the State an opportunity to be heard in cases in which grave rights of hers are involved.

JURISDICTION—*Continued.*

The charter of the plaintiff possesses all the features of a contract. The legislature was, therefore, without power to repeal it; and Act No. 86 of 1884, in so far as it operates to repeal the said charter, is declared unconstitutional, without prejudice, however, to the rights of the State, whatever they may be, under the other provisions of said act.

Carondelet Canal Company vs. Lugger, etc., p. 100.

The Court of Appeals has jurisdiction over a controversy, the matter in dispute wherein involves the allowance to a minor in necessitous circumstances, of one thousand dollars under Art. R. C. C. 3552, which is a reproduction of the Act of 1852.

The recent amendment of Art. 81 of the Constitution in force, which gives to this court exclusive jurisdiction when the right to a homestead is claimed, refers to the homestead mentioned in Arts. 219 to 223 of that instrument, and not necessarily to the provisions of Art. R. C. C. 3552, which only makes necessitous widows and minors privileged creditors of the estate of the deceased.

A *mandamus* lies to compel the Court of Appeals to hear and determine such a case, although it has ruled that it has no jurisdiction over it.

The State ex rel. Davidson vs. Judges, etc., p. 109.

The powers of a probate court over property claimed as belonging to a succession under administration are purely jurisdictional in their character. They do not authorize the judge, on his own motion, to deal directly with the property. He can neither make nor revoke titles or leases, of his own accord. His powers must be set in motion by a proper litigant in due form of proceeding; and, when they affect the adverse rights of possession of third persons not connected with the succession, the ordinary action by petition and citation must be resorted to.

Even a trespasser is protected in his possession until his trespass is established by due proof at the demand of one who shows some better right in himself, in a proper suit. He cannot be ousted on a proceeding by rule—still less by an *ex parte* order of court.

Succession of Kate Townsend, p. 114.

Certiorari issues only to test the validity of proceedings, and not the correctness of judgments rendered by courts of competent jurisdiction. It serves to pass upon questions of *form* and not of *substance.*

Since the adoption of the Constitutional amendments of Article 81, fixing the jurisdiction of this Court, all the powers of this Court,

JURISDICTION—*Continued.*

over causes decided by it, in which the matter in dispute does not exceed $2000, have been transferred to and now vest in, Courts of Appeals, by whom they can be exercised in proper cases, as effectually as they could have been by this Court, previous to the amendment.

This Court is impotent to afford the relief now sought.

The State ex rel. Mrs. Race vs. Judges, etc., p. 120.

In an action by a judgment creditor, for the simulation of a purchase of property, which he alleges to be that of his debtor, the value of the property, and not the amount of the judgment sought to be executed thereon, is the real matter in dispute.

J. Chaffe & Sons vs. DeMoss and wife, p. 186.

The State court has jurisdiction of a hypothecary action to enforce a judicial mortgage resulting from the inscription of the judgment of a Federal Court.

The inscription of the judgment of the Federal Court sitting in this State, creates, equally with that of a judgment of a court of the State, a judicial mortgage

J. I. Adams & Co. vs. T. S. Coons et al., p. 305.

A court of appeals has no jurisdiction over a suit in which more than $2000 is claimed, although the judgment appealed from be for less.

The State, ex rel. Hargrove, adm'r, vs. judges, etc., p. 372.

In a rule taken by a judgment creditor against parties holding mortgage rights against the property of his debtor, for the purpose of obtaining the erasure of such mortgages, the test of the jurisdiction of the Supreme Court is in the amount of the mortgage thus sought to be cancelled, and not in the amount of the judgment, or in the value of the property affected thereby. State ex rel. Bloss vs. Judges, 33 Ann. 1351, affirmed.

An appeal bond, although not signed by the appellant, is sufficient if signed by the surety.

R. Bussiere vs. E. Williams et als., p. 387.

An order transferring a cause from the Supreme Court to a circuit court, on the representation of appellant and appellee that the matter in dispute, or fund to be distributed, is less than $2000, will be rescinded where it is subsequently ascertained that it was based on an error of fact, and that the amount involved clearly brings the case within the jurisdiction of the Supreme Court.

Succession of P. G. Quinn, p. 391.

JURISDICTION—*Continued.*

A city court has no jurisdiction over a suit, the object of which is to obtain a perpetual injunction to prevent the exercise of a right exceeding in value one hundred dollars.

The State ex rel. Gas Light Co. vs. Judge, etc., p. 583.

The Supreme Court has no jurisdiction in a case involving the legality of wharfage dues, unless the amount in dispute exceeds $2000.

The mere question of the constitutionality of a city ordinance does not vest this Court with jurisdiction irrespective of the amount involved, unless the question involves the legality or constitutionality of a fine, forfeiture or penalty imposed by the municipal corporation. *J. Sweeney vs. Nick Seiler & Son, p.* 585.

The District Court of the Parish of Natchitoches is without jurisdiction to enforce a judgment of the District Court of the Parish of Bossier, or to entertain a suit against the executor of a succession opened and pending in the latter parish.

The only allegation upon which the jurisdiction in this case can be sustained, is the allegation of a personal contract between plaintiff and defendant individually and not as executor. That allegation is not sustained by the evidence.

H. P. Gee vs. G. W. Thompson, p. 598.

A court which has no jurisdiction over a cause *ratione materiæ*, exceeds the bounds of its authority when it issues therein an injunction.

Such court has in such cases no power to entertain a rule for contempt for violation of such illegally issued injunction.

The State ex rel. Gas Light Co. vs. Judge, etc., p. 605.

In a suit by the syndic of an insolvent for the purpose of annulling a contract alleged to operate an unjust preference in favor of one creditor over the others, the value of the property pledged or transferred is the test of the jurisdiction of the appellate court.

If the amount of the security sought to be recovered by the syndic does not exceed $2000, the Supreme Court is without jurisdiction.

J. W. Black, Syndic, vs. N. McStea, p. 620.

A court having probate jurisdiction is competent to homologate an account voluntarily rendered by a tutor to his ward, suing for such, although such tutor be domiciled beyond its territorial boundaries.

That court may also find and render a money judgment in favor of the ward against such tutor, and is competent to receive such judgment, although the tutor continues so to be domiciled.

If the tutor had a right to except to the petition of the ward claiming an account on the ground of his having his domicile out of the

JURISDICTION—*Continued.*

jurisdiction of the court, he should have done so before judgment. Having then failed to urge it, he cannot raise it as a defense to the proceeding to revive. *O. Theriot vs. B. Bayard, p.* 689.

It is only where the legality of a tax is at issue, that is, where a tax is charged as being unauthorized by law, or being authorized, that the law itself is unconstitutional, that the Supreme Court has exclusive appellate jurisdiction.

From the fact that an assessment is erroneous and that a sale of the property assessed is a nullity for some error, it does not follow that the tax, to pay which the sale was made, is in itself illegal. An issue on those questions does not involve the legality of the tax.

A circuit court has appellate jurisdiction over such a cause which does not come within that of this Court, where the matter in dispute does not exceed two thousand dollars.

In such a case. a prohibition does not lie to the circuit court.

The State ex rel. David vs. Judge, etc., p. 898.

LEASE.

A prohibition will not issue to a city court in an ejectment suit, in which the defense is a renewal of a pre-existing lease exceeding one hundred dollars, when on the trial of the exception to its jurisdiction the renewal was not proved.

Time is of the essence of such defense. If the defendant in the suit did give notice, he should have proved, with certainty, not only the notice of his inteution to renew, but that it was given before the expiration of the lease.

The State ex rel. Carl vs. Judge, etc., p. 380.

When, during the pendency of a lease, it is discovered that repairs are essential to secure the safety of the building, and which are urgent and not safely to be postponed, the lessor has the right, as it is his duty, to make them; and the rights of the parties are governed by Art. 2700, C. C. The lessee must submit to the inconveniences resulting therefrom, having the right to claim a diminution of rent, in case they last more than one month, or a total remission if he is compelled to abandon the premises.

He is not entitled to damages for unavoidable injury to his business, or for annoyance and vexation. Injury to the lessee's stock and fixtures stands on a different footing, if occurring without fault of the lessee. *E. P. Bonnecaze vs. Mrs. A. Beer, p.* 531.

The bid for a lease is merely a premium over and above the rental. The purchase of the lease superinduces the obligation on the part of the buyer to pay the rents for the remainder of the term.

LEASE—*Continued.*

Where the rents have been paid out of the assets of an insolvent or failing debtor, he or his creditors are subrogated to the rights of the lessor, and those creditors can successfully proceed by garnishment against the purchaser of the lease for the rental due subsequent to his purchase.

A. Lehman & Co. vs. D. Dreyfus, p. 587.

A tenant cannot be permitted to dispute the title of his lessor as long as he continues in possession.

J. Hanson vs. J. M. Allen, p. 732.

If any one, under pretense of rights afterwards judicially determined to be unfounded, uses process of law to restrain another in the prosecution of a lawful claim, he cannot use the delay his own act has caused to defeat the claim he has wrongfully resisted. A party cannot provoke and protract litigation, based on his refusal to deliver leased premises, and then avail himself of the lapse of time to avoid damages for his wrongful refusal. Prescription does not run pending the litigation thus provoked.

Where proceedings in ejectment have been taken and the defendant justifies his holding possession under an alleged unexpired lease, and the issue has been determined against him, he cannot afterwards, when sued for damages for illegal retention of the property, set up again the alleged unexpired lease. The ejectment suit is *res adjudicata* upon that and cognate matters.

Among the damages that a lessor is entitled to recover from a recalcitrant lessee who unlawfully retains the leased premises is a bonus that another lessee has *bona fide* offered for a long lease, the rental during detention that such other lessee has engaged to pay, the attorney's fees paid by the lessor in getting possession of his property, and compensation for whatever advantages have been lost by the lessee's obstinate withholding possession.

L. Harvey vs. G. Pflug, p. 904.

MANDAMUS.

A mandamus does not lie to compel a court of appeals to reinstate and try a cause before it, which was dismissed on the ground that the record brought up is not submitted in the form prescribed by the rules of the court.

The State ex rel. Forman vs. Judges, etc., p. 111.

A *mandamus* lies to compel the State Auditor to issue his warrant on the State Treasurer for the payment of a valid claim recognized by law, to meet which, an appropriation was made by the Legislature.

MANDAMUS—*Continued.*

The holder of such claim is authorized to refuse a warrant drawn against a general fund to the credit of a particular year, when the law directs payment to him from *any* money in the Treasury not appropriated, and when there is not money enough to the credit of that fund, for that year, to satisfy that warrant.

Such holder can require the Auditor to issue to him another warrant on the treasurer, to be paid out of the general fund at the time in the Treasury, unappropriated, and to the credit of another year, out of which it can be paid.

The State Auditor has no authority to restrict the payment of the holder of *such* claim, to the general fund of a particular year, out of which it could not be paid.

Under the terms of the concurrent resolution of the General Assembly, No. 124, adopted subsequently to Act No. 28 of 1884, the beneficiaries therein named are entitled to a distribution among themselves, only of the *surplus* or *residue* of the general fund of 1883, remaining after payment of the claim recognized by Act 28 in favor of the relator; which makes the necessary appropriation to meet the same, out of money at the time in the Treasury.

The State ex rel. C. A. Campbell vs. Steele, Auditor, p. 353.

The writ of mandamus does not lie to compel corporations to perform obligations arising simply from contract.

Nor does it lie when there exists other adequate legal remedy and especially when such remedy is expressly provided by the statute imposing the duty.

Although a duty imposed by a municipal ordinance may become operative on the subject corporation only by virtue of its acceptance in the form of a contract, this will not prevent its enforcement by mandamus, if the duty be of a nature within the legislative power of the municipality in the exercise of its police powers and independent of the consent of the corporation; but when the obligation is of a character which could only arise from voluntary contract and could not, otherwise, be imposed, mandamus will not lie.

The State ex rel. New Orleans vs. New Orleans and Carrollton R. R. Co., p. 589.

1. The failure of a district judge to decide a cause within five months after its submission, amounts to a denial of justice.
2. A *mandamus* will issue in such a case, to coerce a decision of the suit.
3. The delay is unreasonable and furnishes good cause of complaint.

The State ex rel. Martin vs. Lazarus, Judge, p. 610.

MANDAMUS—*Continued.*

When a mandamus has been made peremptory commanding an inferior judge to decide a case without further delay and he disobeys or fails to obey that mandate, the Supreme Court will order the recalcitrant judge to be arrested and imprisoned until he has obeyed its mandate. *Same case, p.* 614.

A *mandamus* lies to compel the granting of a suspensive appeal from a judgment directing the sale of succession property exceeding two thousand dollars in value.

The capacity of one representing himself as attorney for absent heirs, and whom the *mortuaria* shows to have been appointed and to have acted as such, and who was expressly recognized by the judgment from which he seeks to appeal, cannot be successfully contested by the district judge, on the application for the mandamus.

The State ex rel. Upton vs. Lazarus, Judge, p. 830.

In an application for mandamus to compel an inferior judge to grant a preliminary injunction which he has refused, the mere allegation of error in the ruling, unaccompanied by any charge of arbitrary or oppressive conduct, denial of justice, refusal to perform any duty, or by any showing of absence or inadequacy of other means of relief, will not support the remedy sought. The writ of mandamus is an extraordinary remedy, only allowed under the exceptional circumstances set forth in the law, the existence of which must be sufficiently set forth in the petition.

The State ex rel. Nicholson vs. Judge, etc., p. 842.

MARRIAGE.

This being an action for nullity of a marriage on the ground of a subsisting prior marriage of one of the parties, and the evidence sustaining the charge being held sufficient, judgment is rendered for plaintiff.

M. L. Lutenbacher vs. S. Loscher, p. 831.

MARRIED WOMEN.

A married woman who intervenes in an act of mortgage by her husband, in order to waive or renounce certain rights to the property, is not a third party, in the sense of the Civil Code.

When she subsequently purchases the same property, under a judgment of separation of property against her husband, and retains in her hand the amount of the mortgage granted as above stated—the conventional mortgage follows, and attaches to the property in her hands—and remains in full force as long as the debt of her husband is kept alive.

MARRIED WOMEN—*Continued.*

The married woman thus situated cannot be relieved by the failure of a timely reinscription of the mortgage, which is not perempted *quoad* the contracting parties. Conventional mortgages are not extinguished by the prescription of ten years.

Factors and Traders' Ins. Co. vs. J. J. Warren et al., p. 85.

A married woman, duly separated in property from her husband, has the legal right to purchase property for her own and separate account, either for cash or on terms of credit—and property thus purchased becomes her paraphernal estate. The burden of proving the invalidity of such purchases, is on the party attacking the same. *J. Chaffe & Sons vs. DeMoss and wife,* p. 186.

A married woman duly authorized to contract by a competent judge, under Art. 127 Civil Code, cannot contradict her own declarations and the recital in the judge's certificate, in the absence of allegations of fraud against the creditor, or of fraud committed to his knowledge. But evidence under an issue without the required allegations, admitted without objection, will be considered—and the pleadings being thus enlarged, will open the door to the investigation of the real consideration of the contract sought to be enforced against a married woman. If the evidence shows that the contract was not based on the objects stated in the judge's certificate, but for a different object to the knowledge of the creditor, the burden of proof that the contract enured to the benefit of the wife is thus shifted on the creditor seeking to enforce the contract.

A judge of a parish court, under the Constitution of 1868, was absolutely without power to authorize a married woman to contract a debt exceeding five hundred dollars, even when acting in the absence or place of the district judge on an application addressed to the latter.

In order to give validity to a contract by a married woman for the ostensible purpose of taking her husband out of jail, the evidence must show that the husband was actually incarcerated, and that he was liberated through the means of his wife's contract, either by sale of property or loan of money.

It is not sufficient to show that he was threatened with a criminal prosecution which was averted by means of his wife's contract.

Mrs. Gibson vs. Bennett Hitchcock et al., p. 209.

A chief object of the laws authorizing the wife to obtain a judicial separation of property is to emancipate, not only her property, but her industry, from control of the embarrassed husband, and from

MARRIED WOMEN—*Continued.*

liability for his debts; to enable her to conduct business in her own name and for her own account and benefit, and thus to earn a livelihood for herself and family. When she thus conducts business in her own name, and ostensibly for her own account, and induces innocent third parties to contract with her, upon the faith of her own and her husband's representations that the business is her own, she cannot afterwards repudiate her obligations on the pretense that the business was really that of the husband, in opposition not only to her representations, but to all the ostensible appearances of its conduct. Having thus represented and held out the business as her own, by conducting it in her own name through a series of years, as well as by her express assurances, the doctrine estoppel fully applies.

J. Chaffe & Sons vs. Mrs. A. L. Watts, p. 324.

A married woman cannot bind herself as surety for her husband.

The State vs. W. W. Bradley, et al., p. 623.

A married woman cannot legally be held responsible as a *negotiorum gestor,* during the existence of the community, even under a showing that she had made use of funds received by her husband for the account of a minor, either as an intermeddler or as the tutor of said minor.

In a suit against a married woman duly separated in property from her husband, no judgment can be rendered against the latter, who is only a nominal party to assist his wife.

H. Glass and husband vs. A. E. Meredith and husband, p. 625.

A married woman can compromise a pending suit against her and legally bind herself and her property to the stipulations of the compromise.

When suits for large sums have been instituted against a married woman and she has made answer thereto and failed to plead that the debt was her husband's, or marital coercion or other like defense, and has compromised those suits and thereby obtained a remission of a large part of the sum claimed, she cannot afterwards in a suit upon the compromise notes set up successfully the above defenses and void the payment of her obligations thus deliberately given.

G. W. Sentell & Co. vs. D. Stark and husband, p. 679.

An appeal by a married woman will not be dismissed, on objection, urged for the first time in this Court, of want of marital authorization, where the record shows that the husband attended the

MARRIED WOMEN—*Continued.*

trial of the cause below and signed himself the bond of appeal, with the wife. His active agency in the prosecution of the suit constitutes authorization.

The policy of the law in requiring such authorization is, not only the prevention of ill advised litigation by or against the wife; but also the protection of the adverse party, in order that the judgment to be rendered may bind the wife.

Whenever it appears that the litigation is sanctioned by the husband and however this be shown, the right of the wife to stand in Court for further prosecution or defense, should be recognized.

Mrs. Fairex vs. Henry Bier, p. 821.

The testimony of a married woman in proof of a paraphernal claim against her husband in a sum exceeding $500, unsupported by corroborative circumstances is insufficient to establish the claim.

Citizens' Bank vs. Maurean et als., p. 857.

MINORS.

Judgments obtained against a tutor, during the minority of his ward, for moneys received are not money judgment which can be prescribed against by the lapse of ten years.

They are *prima facie* proof of indebtedness, in any settlement between tutor and minor, after emancipation or majority.

If not thus used within the *four* years which follow emancipation or majority, they cease to produce any effect.

They cannot serve as a foundation for an hypothecary action, and the inscription of them in the mortgage office must be erased.

R. L. Cochran vs. Mrs. Violet et al., p. 221.

On a rule by a judgment creditor it is competent for the court to order the cancellation of a minor's general mortgage inscribed against his tutor, when it is shown that such mortgage had been legally and properly substituted by a special mortgage by the natural tutor, in a sum accruing to the minor after a liquidation of the community. *Leeds & Co vs Peter Jones, p.* 427.

A widow who has lived in concubinage with a man, from whom she has had children during her widowhood, and who is considered by persons of her class as depraved—is amenable to the charge of "*notorious bad conduct,*" and should be excluded from the tutorship of her minor issue with the deceased.

The circumstance, if established, that she had ceased all intimate intercourse with her paramour, for the last eighteen months, is insufficient to show reform and to authorize the court to assume the responsibility of entrusting her with the custody of the persons

MINORS—*Continued.*

and with the administration of the property of such minors—as, both would be greatly imperilled in her control.

Succession of Edgar Leblanc, p. 546.

Article 342 of the Civil Code, which prohibits the sale of a minor's property for less than its appraised value mentioned in the inventory, applies only to sales provoked by his tutor, during the course of his administration, and not to sales under execution, either of judgments, or by executory process, for the foreclosure of a mortgage executed by the tutor with the authorization of a competent court, under the advice of a family meeting.

In such a mortgage it is competent in law for the tutor to waive the benefit of appraisement, in case of execution, and to agree to pay attorney's fees in case of suit for collection.

A stipulation for usurious interests in such a mortgage, when the interests are capitalized, cannot entail a forfeiture of the interests, and much less vitiate the whole contract.

Martin, Tutor, vs. Lake, Sheriff, et al., p. 763.

The prescription of four years is a bar to a minor's action against his tutor respecting the acts of the tutorship.

If a provisional account has been rendered by the tutor during the minority and has been homologated, and the minor does not within four years after majority take legal action to finally settle his rights and enforce them, the prescription will apply.

If the real property of the tutor has meanwhile passed into the hands of purchasers under forced alienations, they may plead prescription even though the tutor has renounced it.

Mrs. E. Bedele vs. D. Calder et al., p. 805.

MORTGAGE.

The holder of a conventional mortgage which does not contain the pact "*de non alienando*" cannot reach the mortgaged premises, if it has been subsequently transferred, in the hands of a third possessor, holding the same under color of title, by a direct seizure on a judgment obtained against the original mortgagor. His recourse is exclusively through the hypothecary action proper.

It is no defense to the injunction of the third possessor, to allege the nullity of his titles, unless such nullity is apparent on the face of the papers.

The enforcement of his prior lien must be obtained by means of the hypothecary action. The nullity of the third possessor's title must be presented and can be considered only in a direct action.

J. E. Leonard vs. the Sheriff et al., p. 299.

MORTGAGE—*Continued.*

A discrepancy between notes sued on and notes described in an act of mortgage, consisting merely in the name of the month "July" instead of "June," is insufficient to defeat a claim for the enforcement of payment with *mortgage* on the property described in the act and in the petition, particularly where there is no pretence that the mortgagor has issued notes identical with those described in the act and which are outstanding, and where there is no proof in support of such objection.

In order to be able to determine whether an act offered is or not that mentioned in the petition, the same should first be offered and received. The objection to its reception goes to the effect and not to the admissibility.

Attorney's fees stipulated in such act as to be paid by the mortgagor in case of suit on the notes, and *fixed* at five per cent, payment thereof being secured like the notes by mortgage on the property hypothecated, are recoverable and must be allowed.

Thompson & Co. vs. Lowery, p. 646.

Where a note with the mortgage securing the same are assigned by notarial act "without recourse," the latter words amount to a mere stipulation of non-warranty; and their effect, so far as the mortgage is concerned, is governed by the Civil Code and not by the Law Merchant.

Mere knowledge of attorney at law, not derived in his capacity as attorney of plaintiff but from his attorneyship for another party, is not binding as notice to plaintiff.

The assignor of an incorporeal right, even under stipulation of non-warranty, warrants the existence, not only of the right, but of the mortgage or other accessary securities attached to and transferred with it.

When a mortgage thus transferred turns out not to have existed as a part of the land covered by it, remaining good as to the rest, the transferror is bound under the warranty to make good only the loss from such eviction.

If the remaining security is sufficient to make good the debt, and if it is lost or impaired only through the act, negligence or fault of the transferree, he loses his recourse on the transferror on account of the eviction. *L. Templeman vs. Hamilton & Co. et al., p.* 754.

Recording a judgment ordering a usufructuary to give bond and prescribing the amount of the bond will not create a judicial mortgage in favor of those in whose favor the bond is to be given. There is no judgment for money therein, nor ascertainment with

MORTGAGE—*Continued.*

precision of what sum is due, but merely that a bond be given in a specified sum.

Judgments recorded in different parishes operate as judicial mortgages upon the lands in each parish from their respective dates of each recordation. *Succession of H. P. Dickson, p.* 795.

MUNICIPAL CORPORATIONS.

The State and municipal corporations duly authorized, can, in the exercise of the rights of eminent domain and of police, empower telephonic companies to use the streets and sidewalks of a city. for the purpose of erecting poles and other works necessary for the transmission of intelligence, and can impose terms and conditions for the enjoyment of the privilege.

Abutting owners in front of whose premises such poles have been erected, with such authority and after compliance with all conditions imposed for the benefit of the public, have no occasion to ask the removal of the same, when the poles do not specially and materially obstruct them in the free use of their property, or invade some vested right, and do not inflict on them some injury which is not common to all other persons.

Such owners have no *fee* in the sidewalk, or street, in this State, and have no right to claim previous just compensation.

Poles erected under such circumstances are not such nuisances as such owners can successfully ask to have abated.

E. Irwin vs. Great Southern Telephone Co., p. 63.

A town council and mayor cannot lease from the parish a ferry and bind the corporation to pay the price they have bid for it unless the town charter specifically authorizes its authorities to do that act. Municipal corporations cannot legally contract debts for imaginary necessities or real conveniences. They are not permitted to exercise powers not specially delegated to them in their charters unless such powers are incident to those expressly granted or flow from them by necessary implication. A debt contracted by a town illegally is not enforceable.

Where a town has been exempted by the Legislature from parochial taxation and instead has assumed the payment of a fixed portion of certain detailed expenses of the parish to be furnished the town by the parish officers at stated periods, the right of action of the latter against the former accrues upon the expiration of the delay granted by the Act.

Police Jury of Ouachita vs. Monroe, p. 641.

MUNICIPAL CORPORATIONS—*Continued.*

Suit in the name of "the town of Opelousas on the relation of the president and board of police of said town," is the equivalent of suit in the name of "the board of police of the town of Opelousas," which is the proper corporate title.

The fact that the board is authorized to appoint a collector, whose duty is to collect its taxes and pay them over to the board through its treasurer, does not prevent the corporation from suing in its own name to recover dues which its collector has failed to collect.

Where it appears that an ordinance has been duly considered and passed in the mode required by law by the board and has been duly promulgated by publication in the official journal bearing the name of the president as having signed the same, and had passed into execution, it will not be invalidated by the fact that the president had not actually signed it. The legislative provision requiring the president to sign all ordinances will, under such circumstances, be treated as directory only, unless the intent of the Legislature to make it an essential condition be apparent.

Opelousas ex rel. etc., vs. C. B. Andrus, p. 699.

NEGOTIABLE INSTRUMENTS.

The transferree, for value, of negotiable securities not due, from the possessor and apparent owner, gets a title which cannot be defeated without proof of actual or constructive notice of the imperfect title of his transferror amounting to *mala fides*. The fact that such securities have attached to them interest coupons past due, does not destroy the negotiability of the bonds.

Mrs. Fairex vs. Henry Bier, p. 821.

NUISANCE.

A railroad switch or turn out laid, *without* municipal authority, on part of a public street, is a *nuisance*, which the owner of property in front of which the same is used is entitled to have abated, as inflicting injury peculiar to himself.

Such owner, however, has no standing to champion the rights of others, in front of whose property the switch is laid *with* municipal authority, and who do not complain.

Jesse K. Bell vs. J. E. Edwards, p. 475.

PARTITION.

The titles of defendants resting upon adjudication under a judicial partition sale, the validity and judicial character of which cannot now be questioned, they hold the property disincumbered of judicial mortgages attaching to the interests of individual owners in

PARTITION—*Continued.*

indivision, and said mortgages were transferred to the proceeds of sale. *Campbell, adm'r, et al. vs. J. B. Woolfolk et als., p.* 320.

A cause of action for a partition is disclosed where the petition avers that the petitioner is a child by a first marriage, that her father died owning half of the property composing the community existing during his second marriage, of which there was no issue, and that the petitioner is his sole heir.

The defense, that such partition cannot take place, for the reason that such property is burdened with a usufruct in favor of the surviving spouse, lacks foundation and is no valid objection.

A. Meyer vs. Z. Schurburck, p. 373.

PARTNERSHIP.

Where a partner has retained the right to dissolve the partnership at his pleasure, and on a given day orders the books to be balanced, for the purpose of ascertaining the interest of the retiring partner, but on the completion of that work fails and neglects to pay the sum thus found to be due, and the retiring partner remains in daily attendance and does in the business of the firm precisely what he had always done, without remonstrance or complaint of the dissolving partner, the partnership will be held to have continued until this latter has abandoned his position, or has been driven from it, or the former has done some overt act signifying that the dissolution has already taken place. *J. Oteri vs. S. Oteri, p.* 74.

An insolvent, who avers in his petition of surrender that he was carrying on his business under a firm name of his own "and Company," will not be allowed to prove, in a contest over an account presented by himself as syndic, that the firm was composed of himself and another person. In such a case, creditors who dealt with him under his firm name can obtain no preference over creditors who had previously dealt with him under his individual name. Hence all his creditors are entitled to an equal participation in the distribution of his assets.

L. W. Miller & Co. vs. Creditors, p. 604.

A partnership may become a member of a new partnership; and while the interest of the former in the latter may be a firm asset of the first partnership, this will not prevent one of its members from suing for a liquidation and settlement of the general partnership, on appropriate allegations, and by making his fellow-members of both firms parties.

In such a settlement, where the affairs of the general partnership are concluded, its debts paid and the net profits for division ascer-

PARTNERSHIP—*Continued.*

tained and reduced to cash, and where it appears that the partner holding said funds has settled with other members of the member firm for their interests, defendants have no right to oppose to plaintiff the necessity of liquidating the subordinate firm, but he will be decreed directly entitled to recover his share.

A. C. Simonton vs. L. D. McLain et al., p. 663.

PLEADINGS AND PRACTICE.

When a sale under executory process is attacked for nullity of the mortgage under which it was provoked, the adjudicatee of the property must be made a party to the proceedings.

In a contest between rival judgment or mortgage creditors who assert their rank and precedence over the seizing creditor by means of third oppositions claiming distribution of the proceeds of sale, and one of them attacks the mortgage as null and extinguished without making the adjudicatee a party, the judgment of distribution will be vacated as in case of non suit.

W. P. Smith vs. T. R. Brady, p. 122.

An obligation containing the words: "This is to certify that I am to pay," etc., is an unconditional promise to pay money or a promissory note.

Suits brought on unconditional obligations to pay money, must be tried without a jury, *unless* the defendant pleads want of consideration, or sets up a reconventional demand, *and* makes oath to the truth of the allegations of his defense.

In such suits, and in the absence of such oath to such defenses, the court is right in striking the case from the jury docket and in passing upon it itself.

Joseph Meyer vs. Simon Weil, p. 160.

When no issue has been joined either by a default judgment or answer filed and no proof has been offered, and when in addition to these defects an amended petition has been filed and has not been served but the judgment is rendered as prayed therein, it must of necessity be reversed.

The State ex rel. Stevenson vs. Burke, Treasurer, p. 231.

An allegation that the plaintiff possesses the property as owner does not make the action petitory. It was necessary to allege that she possessed as owner or in some other capacity that entitled her to the possession. When the prayer is for the restoration of possession alone, the action is possessory.

Where the defendant pleads in reconvention sums expended for repairs, taxes, etc., and was prevented from introducing testimony

PLEADINGS AND PRACTICE—*Continued.*

in support of his plea because the case went off on an exception, it will be remanded to enable him to introduce such testimony when he alleges that he possessed in good faith.

Mrs. Huyghe vs. H. Brinckman, p. 240.

Objection to the capacity of plaintiffs to stand in judgment not raised by the pleadings will not be noticed.

J. I. Adams & Co. vs. T. S. Coons et al., p. 305.

A judgment creditor has the legal right to remove obstacles preventing the satisfaction of his judgment on his debtor's property.

To that end he is authorized in law to proceed by rule against his debtor's mortgages, pending his execution and before the sale.

R. Bussièré vs. E. Williams, et als., p. 387.

It is not against good morals and public policy for a plaintiff to allege that she has confessed judgment in favor of one to whom she owed nothing for the purpose of erecting a scarecrow to frighten away, not her own creditors, but the creditors of another who had no claim upon her or her property. An exception of no cause of action based on this ground will not be sustained.

N. J. Baker vs. McGuire, Sheriff, et al., p. 628.

Vagueness, want of precision, or generality in the averments of a petition, should be taken advantage of by exception before issue joined, unless the opposite party has not therefrom had sufficient notice of the nature of the demand and would be truly surprised. The object of pleading is to notify the adverse party, so that he may be prepared to rebut. He cannot, for the lack of more explicit pleadings, be permitted to exclude pertinent evidence of whose existence and intended introduction he was previously aware.

It is also to serve as record evidence to bar future investigation of same matters between same parties.

A petition for slander which contains a clear statement of the time, place and circumstances, when, where and in what manner the defendant acted, and which sets forth want of probable cause, malice and injury, and a specific money claim, discloses a cause of action.

If, in order to prepare himself, the defendant wishes more explicit allegations, he must require the same by exception filed *before* issue joined. Failing to do so then and in that mode, he cannot object at the trial to the introduction of evidence in support.

P. Doullut vs. H. McManus, p. 800.

A party in possession of property as owner, and who is sued on an *assumpsit* of a debt secured by mortgage on said property, will not

PLEADINGS AND PRACTICE—*Continued.*

be allowed under a general denial to raise the issue that he has ceased to be the owner of such property, and that the same is owned by another person who is not a party to the suit and whose alleged title could not be thus passed upon.

Citizens' Bank vs. Maureau et als., p. 857.

PLEDGE.

The pledgee of collaterals, who proceeds for a judicial foreclosure of his pledge, is not debarred from purchasing at the judicial sale thereof. *J. I. Adams & Co. vs. T. S. Coons & Co.*, p. 305.

PRESCRIPTION.

The prescription of five years bars an action to rescind a partition. The prescription runs from the majority of minors becoming of age, or from their full emancipation, which relieves them of disabilities which attach to minors.

Mrs. C. C. Sewall et al. vs. Mrs. P. L. Hebert et als., p. 155.

The prescription of possession of ten or thirty years, to be successful, must be supported by a continuous and uninterrupted possession.

Mrs. M. A. Lane vs. R. S. Cameron, p. 250.

Thirty years' prescription may be successfully invoked by a possessor in good faith of tracts of woodland forming parts of a plantation upon which he has lived continuously for that time, although he may not have felled a tree from those tracts, or done any other acts of corporeal possession of that part of his plantation.

Green Bros. vs. B. Witherspoon, p. 751.

Successive decisions of this court have established the doctrine that the prescription of judgments may be interrupted in the same mode and by the same means that prescription of other debts may be interrupted.

A former suit against the same defendant personally will interrupt prescription when the latter suit is against him as executor, and in it the heirs of the original plaintiff are plaintiffs, and the form of the latter suit is an opposition to accounts, the thing demanded being the same in both.

The testimony of the defendant in this first suit is admissible on the trial of the second, and its admissibility is not affected by the fact that the first suit was dismissed for want of jurisdiction.

Succession of B. L. Saunders, p. 769.

All persons who have an interest in acquiring an estate by prescription have a right to make the plea, even though they from whom they derive title should renounce it.

PRESCRIPTION—*Continued.*

One not a party to a suit as defendant, whose interest is threatened or attacked by a plaintiff, may intervene and plead prescription.

If a defendant, who has pleaded prescription in the court below, withdraws his plea in the Supreme Court and prays an affirmance of the judgment which was against him, and an intervenor who has acquired that defendant's rights has pleaded or then pleads prescription, his plea will be maintained if it appear that the defendant's plea would have been maintained.

Giddens, Ex'r, vs. M. Mobley et als., p. 900.

PRIVILEGES.

A creditor's claim for vendor's privilege will not be recognized if he has allowed the goods on which he claims the same to be sold confusedly with a mass of other things belonging to his purchaser, and if he fails to identify his goods.

F. A. Lambert vs. Pierre Saloy, p. 3.

The five dsys lien on agricultural products in favor of the vendor exists whether the sale was made for cash or on credit, and is enforceable after the produce has gone into the possession of third parties under a *bona fide* sale equally as well as while it is in possession of the original vendee. Gumbel vs. Beer, 36 Ann. 484, reaffirmed.

In a suit for produce or its value accompanied by a sequestration based on a defective affidavit, when the defendant fails or refuses to object to the affidavit or to take advantage of its defects, the intervener is powerless to avail himself of them. He cannot complain of irregularities which the defendant has condoned.

The sole change in the inventor's status made by the Act of 1876 is to enable him to bond the sequestered property.

Hawkins & Roberts vs. F. Beer, etc., p. 53.

The lessor of a plantation by bonding the property provisionally seized for his rent cannot thereby defeat the privilege of the plantation laborers thereon, who have intervened in the suit prior to the bonding, asserting their privilege.

Nor is it necessary to preserve the privilege of such laborers, that they should demand a separate appraisement of the crops seized prior to the bonding or to judgment rendered.

A workman or mechanic who repairs the sugar-house and the machinery therein, is not entitled to a privilege on the crops or other property subject to the laborers' privilege.

The plantation laborers are entitled to a superior privilege over the lessor only on the crops; as to the residue of the property subject

PRIVILEGES—*Continued*

to the two privileges, their privilege is concurrent with the lessors.

All laborers on a plantation who are employed in the planting, cultivating, gathering and preparing a crop for market, and in work connected therewith or auxiliary thereto, are equally entitled to the privilege provided by Act 3217, C. C.

B. Saloy vs. P. B. and A. Dragon, p. 71.

The laborer has the first and paramount privilege upon the crops raised by his labor for payment of his wages and a concurrent privilege with others upon the agricultural implements and stock used in the cultivation of the crops, while the factor has a privilege upon the crops alone and inferior in rank to the laborer.

In a contest between the factor and the laborer, the latter cannot be compelled to discuss the movables before enforcing his privilege on the crops because his lien on the crops is superior to all others and he is entitled to be first paid out of the fund produced by them. His concurrent lien on the movables is only an additional security to which he need not resort until the primary fund has proved insufficient. *M. A. Montijo vs. F. I. Montijo, p.* 703.

Creditors who *in concurso* over the proceeds of a sale of a plantation and appurtenances, claim privileges on movables attached to the realty, cannot enforce such privileges unless the specific items on which their privileges would attach have been separately appraised. The privilege is in the nature of a vendor's lien, and it will affect only the specific property sold to the debtor.

Privileges are *stricti juris;* they cannot be created by the convention of the parties; they must flow from the nature of the contract.

Citizens' Bank vs. Maureau et als., p. 857.

PROHIBITION.

It is not until after a plea to the jurisdiction has been made and overruled below, that an application for a prohibition can be entertained by the Supreme Court. In the absence of an averment to that effect, the prayer for relief is premature and cannot be allowed.

The State ex rel. Morgan's R. R. Co. vs. Judges, etc., p. 845.

PUBLIC SCHOOLS.

The general laws of the United States consecrating *lot* 16 of townships to school purposes apply only to such lots as have been surveyed as square or rectangular. They do not apply to radiating, anomalous or irregular sections.

By issuing an indemnity school warrant the State parts with what title in the public domain it could by location have secured her. The

PUBLIC SCHOOLS—*Continued.*

divestiture is complete where the location is approved, and on return and surrender the Governor issues a patent.

A possession of more than half a century does not of itself divest title from the general government, which can be accomplished, in a proper case, only after full compliance with the requirements of the law.

The unauthorized entry on the tract book that a lot is "*reserved for schools*" does not operate such reservation.

The fact that one is an employe in the land office does not disqualify him from acquiring scrips and warrants and acquiring valid title to land under them. *J. R. Bres vs. Louviere et als., p.* 736.

RECUSATION.

Prohibition lies to a judge who assumes to take jurisdiction over, and determine a plea recusing him, on the ground of interest. Even if the plea has no merit, it does not appertain to him, but it belongs to the judge who is to be called to try the question, to pass upon it and so declare. 33 Ann. 1293; 34 Ann. 628; 36 Ann. 160; C. P. 338; Act No. 40 of 1880; Const. Art. 112.

It is the duty of a judge, upon the filing of a plea recusing him, on the ground of interest, to call upon another judge for the purpose of passing upon the plea, and to abstain from exercising jurisdiction over the cause, until the plea has been effectually overruled.

On failure on his part to do so, a prohibition will lie to prevent him from taking cognizance of the case.

The State ex rel. Segura vs. Judge, etc., p. 253.

Under Act No. 40 of 1880, which regulates the manner of trying recused cases, the recused judge is stripped of all control over the case, which is transferred in its entirety to the judge selected to try the same. If nine months elapse after recusation without a trial, the cause must then be transferred to the District Court of the nearest parish of an adjoining district, the judge of which is competent to try the cause. That order must emanate from the judge first appointed to try the case—who alone has the legal authority to make the same.

His selection of a parish as the nearest parish within the meaning of the statute, will not be disturbed by the Supreme Court, unless glaringly erroneous or grossly unjust.

This Court will not interfere with the exercise of a sound legal discretion by district judges. This court will take judicial cognizance of the geography of the State and of the proximity to each other of the several parishes of the State.

The State ex rel Fontelieu et al. vs. De Baillon et al., p. 392.

REHEARINGS.

Judgments rendered by this Court on the merits of petitions for writs of *mandamus, prohibition* and the like are as much *final* judgments as any which it can render, and are, therefore, revisable on applications for a rehearing, seasonably and properly made.

No certified copy can issue, by the clerk, of final judgments which have not become executory. Such copies issue only after the lapse of six judicial days, in the absence of an application for a rehearing, or after such has been refused. The contrary opinions in 18 Ann 113, 21 Ann. 50, overruled.

The State ex rel. Gerson vs. Richardson, Judge, etc., p. 261.

The delay for filing applications for rehearing is the same in the Circuit Courts as in the Supreme Court.

Where there is an express provision of law regulating practice, a rule of court contravening it cannot be enforced and must be abrogated. *The State ex rel. Tebault vs. Judges, etc.,* 596.

Only one rehearing in any cause can be granted, unless matters are decided which have not been previously considered and reserve has been made for the application.

A petition for a rehearing filed after a judgment on a rehearing, in the absence of a reserve for such petition, will not be considered, and the clerk is authorized to issue a certified copy of the judgment, which has become final, as though the application had not been made. *The State ex rel. Wentz vs. Wilson, Clerk, etc., p.* 727.

REMOVAL TO UNITED STATES COURT.

An order of seizure and sale in a proceeding *via executiva*, on a mortgage importing confession of judgment, is a judgment, and, after its rendition, such proceeding is not removable from the State to the Federal Court. So, an action brought by the defendant to restrain the execution of such judgment, is auxiliary to the proceeding, and is not removable.

Bondurant vs. Watson, 103 U. S. 287, only applies to injunction suits to restrain execution of State court judgments, when brought by persons not parties to such judgments.

Mrs. Rolston vs. British and American Mortgage Co., p. 193.

An assignment of property to a third person without other considerations than in trust for the benefit of creditors, executed in this State, belongs to a class of tenures not recognized by the law of Louisiana, is of no effect, and binding on no one.

Where such assignment has been made to a non-resident by a debtor, against whom an order of seizure and sale has been taken out, and is immediately followed by an injunction suit in the name of such

REMOVAL TO UNITED STATES COURT—*Continued.*

assignee, to restrain the execution of such order, and by an application to remove the cause to the Federal Court, such assignee will be regarded as a mere nominal and collusive party, representing no interest but that of the assignors, the proceeding will be treated as a mere device to gain delay by such removal, and the order of removal should be denied.

T. C. Sachse vs. Citizens' Bank, et al., p. 364.

Where plaintiff and defendant are citizens of the same State, and the intervenor a citizen of another State, the latter cannot remove the cause pending in a State Court to the Federal Court, unless the controversy between him and the plaintiff can be fully determined in the absence of the defendant from the suit.

Telegraph Co. vs. Morgan's R. R. Co., p. 883.

RES JUDICATA.

When a suit is brought in the District Court to annul a decree of partition rendered by a parish court, and to enjoin a sale ordered thereby, and when the District Court not only dismisses the suit on exceptions, but, at the prayer of defendant, renders an affirmative decree ordering the sale to proceed pursuant to the decree of the parish court, and such judgment is, on appeal, affirmed in this Court, it has the effect of *res judicata*, between the parties and their privies, as to the validity of the judicial power ordering the sale.

One who has intervened in a judicial proceeding and claimed to regulate the distribution of the proceeds of a sale ordered therein, cannot afterwards attack the sale itself for nullity.

Campbell, Adm., et al. vs. J. B. Woolfolk, et als., p. 320.

REVOCATORY ACTION,

In a pursuit by numerous creditors of their common debtor's property, the creditor, who has recourse to a revocatory action in order to annul a fraudulent transfer of his property by the debtor, will obtain no preference over the other creditors, by reason of his revocatory action, if it appears from the evidence that the attacked transaction was not only fraudulent but also simulated and unreal. In such a case the creditors who ignored the pretended transfer and who proceeded by attachment will have priority.

F. A. Lambert vs. Pierre Saloy, p. 3.

SALE.

The presumption of simulation flowing from a sale of property, of which the vendor retains possession by a precarious title, must

SALE—*Continued.*

yield before proof of the good faith of the parties, and of the reality of the sale.

An action for the rescision of a sale on account of lesion, will not prevail if the sale was subject to an aleatory condition, unless the advantage derived by the vendee be of an apparent or immensely disproportionate character.

In such an action the inquiry is not so much as to the market value of the property as to its value to the vendor under the circumstances which surround him.

It is incumbent on the party complaining of lesion to show the value within a certain range otherwise the lesion is a matter of conjecture and is not proved. 7 Ann. 667, 8 Ann. 483.

The demands for rescision on account of lesion, and on account of nonpayment of the price, cannot be cumulated in the same action.

Elisa Parker vs. Richard Talbot, p. 22.

A purchaser at a judicial sale to foreclose a conventional mortgage, has a right to call the seizing creditor in warranty, to defend a suit, the object of which is to evict him.

Such purchaser is entitled to restitution of the price paid, *first* from the seized debtor, and *next*, for deficiency, from the seizing creditor, where the sale is annulled.

The seizing creditor, under article, C. P., 713, escapes liability if the purchaser is obliged to quit the property on the hypothecary action of a creditor having a legal or judicial mortgage on all the property of the party in execution, but he must be held where the action is on a conventional mortgage.

Citizens' Bank vs. F. Freitag, p. 271.

Where there has been a written agreement to sell real estate upon specified conditions and for a price mainly on credit, with the stipulation that if the payments are not made the seller shall have the option to cancel the contract upon giving the buyer thirty days' notice, and may impute the payments already made as rent, and the buyer abandons the contract and himself gives notice to the seller of his surrender of all rights thereunder, the latter is dispensed with the duty of giving the notice stipulated in the contract. It would be a vain and superfluous thing to do.

N. T. Edson vs. M. McGraw et al., p. 294.

Where a power of attorney empowers an agent to sell a lot at the corner of two named streets and the deed of the agent specifies which corner by mentioning the boundaries of the square in

SALE—*Continued.*

which the lot is, the indefiniteness of description of the lot in the power of attorney is cured by the full description of its locus in the deed, and a purchaser of the lot by public auction is not justified in refusing to comply with his bid because of the indefiniteness of description in the power of attorney.

Such refusal is the less justifiable when the original vendor who is the author of the power of attorney did not own a lot at any other corner of the named streets, and he and they who hold under him have possessed the lot thirty years.

J. Valentine vs. W. C. Hawley, p. 303.

A conveyance of lands without description of boundary or location, but merely as "all other lands owned by the vendor in the State of Louisiana," is inoperative as notice to the public of any particular tract conveyed, if not void for want of description.

Green Brothers vs. B. Witherspoon, p. 751.

The transfer of several of a series of notes secured by privilege, cannot compete with his transferee, if he holds one or more of said notes, for the proceeds of the property burdened with the privilege, if they are insufficient to satisfy both claims.

Citizens' Bank vs. Maureau et als., p. 857.

SEIZURE.

The debtor must exercise his right of selecting the newspaper in which the sale of his property is to be advertised when notice of seizure is given him or before advertisement is made. The sheriff has not to hunt him to ascertain his wishes.

N. Soulier vs. Benker, Sheriff, et al., p. 162.

Where a purchaser of land at execution sale fails to comply with the requirements of law and the sheriff refuses to give him a deed and he takes no step to force him to execute one, whereby the title to the land remains on record as in the former owner and creditors of this latter execute their judgments upon the land without objection or protest, the purchaser at such sale will acquire a good title.

Where no title has ever been executed and there is no record of the adjudication, there is nothing to support a petitory action.

W. O. Thistle et al. vs. L. O. Ironsen et al., p. 170.

It is thoroughly settled that the act of 1839, authorizing garnishment proceedings under writs of *fi. fa.*, did not abolish former modes of seizing incorporeal rights, and that valid seizure of such rights was effected by service of notice of seizure upon the debtor thereof.

SEIZURE—*Continued.*

The debt due by a bank to a depositor of money, is an incorporeal right. The fact that the writ of *fi. fa.* was issued to the sheriff of another parish, and the notice of seizure made and served by the latter, does not affect the case. No other officer could execute the writ than the sheriff of the domicile of the debtor of the incorporeal right. C. P. 642.

Levy, Loeb, Schëur & Co. vs. T. H. Acklen, p. 545.

The seizure of the interest of an heir in the property composing the succession in which he inherits, is legal, and the adjudication thereof conveys title.

Heirs of Fly vs. E. Noble et al., p. 667.

Section 3411, Revised Statutes of 1870, which authorizes the release on bond of property under seizure, applies to all executions, to seizures under executory process, as well as to executions under writs of *fieri facias.*

A seized debtor, who applies for permission to bond his property either from seizure or sequestration, cannot be required as a condition precedent to pay judicial costs or expenses incurred by the sheriff for keeping or cultivating the property pending the seizure.

The defendant owes no costs until final judgment on the controversy.

The State ex rel. Roth vs. Judge, etc., p. 846.

SEQUESTRATION.

Sequestration is a rigorous remedy and cannot be extended by implication nor beyond those cases for which the law has expressly provided.

An allegation that the writ is necessary to maintain the property pending the litigation in order that the revenues may be promptly collected is insufficient. There should be apprehension of waste or of conversion to use.

I. Pasley vs. A. McConnell et als., p. 552.

SERVITUDES.

Contracts whereby servitudes are created, are designed to confer rights and impose obligations, which, otherwise, would have no existence and should be strictly construed.

In the absence of express or implied stipulations, the rights and obligations of the parties thereunder must be interpreted and regulated by the laws relative to like servitudes.

Under a contract creating a predial servitude in favor of one estate on another—both being sugar plantations—whereby the owner of the former acquires the right to use a canal or aqueduct running through the latter, so as to "*get water*" from a lake or swamp, in

SERVITUDES—*Continued.*

favor of the subjected or debtor estate, and "*conduct it*" to the favored or creditor estate—the owner of the encumbered property has no right to obstruct the flow of the water by the erection of dams, or to divert it by excavations below the level of the bottom of the canal, unless in cases of necessity for self protection against injury which would otherwise result, or for purposes of great utility, and then only for a time and with due regard to concurrent rights to the water.

Neither can such owner, in the absence of express provision in the contract, discharge into such canal the skimmings or refuse of the sugar-house on his land, where, at the date of the agreement and for years before, such refuse was bridged over said canal and disgorged across it to pursue a further course. Emptying such filth into the aqueduct would not only impede the flow of the water, but also pollute the water so as to render the use of it of not only of no advantage, but make it dangerous in supplying the boilers on the favored estate, which, in consequence of the adulteration, would be exposed to deterioration and explosion.

The owner of the creditor estate has no right to enter upon the subjected one, put up buildings and machinery, unless where it is indispensably necessary for the en joyment of the right to get and conduct water through the aqueduct.

Courts cannot be asked to construe contracts and laws so as to meet hypothetical differences. They have enough to deal with existing wrongs without anticipating supposable evils which may never occur. *Wm. L. Shaffer vs. State National Bank et als., p.* 242.

SHERIFFS.

A sheriff and *ex-officio* tax collector is not entitled to deduct from amounts due the State for taxes and licenses and collected by him, the cost of deeds and copies charged to the State, in cases of purchases of lands sold for taxes and bought by the State. In the absence of any law on the subject, the court cannot permit the deduction or charge or direct the allowance. Such a demand is reconventional in character and is not pleadable against the State. *The State vs. W. W. Bradley et al., p.* 623.

A sound and philosophical rule for the construction of organic as well as statutory law is to ascertain the mischief it was intended to remedy and so to construe as to effect the remedy. Expressions are not to be taken in their technical sense but rather in their common acceptation.

The Constitution has not used the words "criminal matters" in Art. 119 as importing "pending criminal causes" alone, but in a larger

SHERIFFS—*Continued.*

sense, and they include whatever appertains to sheriffs' services in criminal matters.

Sheriffs are not entitled to compensation for serving the venire for the several courts, because summoning jurymen for the trial of criminal causes is service in criminal matters, and the Constitution has provided a specific compensation for those services which cannot be exceeded. *J. Lake, Sheriff, vs. Caddo, p.* 788.

SIMULATION.

A sale of a stock of goods in block with the adjuncts of a country store wholly on credit and without security to an impecunious buyer has the appearance of a simulation, and when the seller has no property left and is largely insolvent, fraud is established and the sale will be annulled at the suit of the seller's creditors.

N. Gregg et al. vs. Lee & Co. et als., p. 164.

The effect of a judgment declaring the simulation of transfers and unmasking the title of the real owner, is not confined to the plaintiff in the suit, but places the property as if the simulated title had never existed and subject to the rights of all creditors according to the rank which the law accords them.

J. I. Adams & Co. vs. T. S. Coons et al., p. 305.

Simulation may be proved by circumstances and presumptions drawn from the surroundings of the parties.

Succession of H. P. Dickson, p. 795.

SLANDER.

This is an action for slander upon the professional character of the plaintiff, which is proved by the concordant testimony of his fellow-citizens and brethren of the bar to be above reproach. The evidence, however, explaining the meaning of the words and the connection in which they were used, acquits defendant on the charge of slander, as found by the jury who tried the case.

Damages for slander cannot be awarded when the only evidence of the alleged slander is vague rumors, the origin of which is not traced to the defendant, and she denies ever having uttered the slanderous words. *Wade R. Young vs. M. J. Jackson, p.* 810.

SUCCESSIONS.

An application for letters of dative testamentary executorship, opposed by one who claims to be executor, can be entertained and granted *ex parte,* where, before the appointment is made. the opponent is removed as such executor. The opposition falls with the removal.

SUCCESSIONS—*Continued.*

Judgments dismissing succession representatives from office take effect upon being signed and cannot be *suspended* by appeal. They are to be executed provisionally.

Succession of Kate Townsend, p. 408.

An administrator cannot sue in his own rights the succession which he represents, and, *vice versa*, as administrator he cannot sue himself.

Hence an heir to a succession, who has filed an opposition to an account presented by the administrator thereof, and who, before trial of his opposition, becomes administrator of the succession of the first or deceased administrator, cannot stand in judgment in his twofold capacity, and no trial can be had on the opposition as long as the complication lasts.

Harris, Adm., vs. J. A. Pickett et als., p. 741.

The heirs of a decedent must recover the principal sum left in the executor's hands as the basis of a usufruct with interest from the usufructuary's death, and the heirs of the usufructuary are entitled to interest thereon from the time the executor ceased paying it to her death. The payment by the executor to the usufructuary of interest through several years is an election on his part to retain the fund at interest.

Succession of B. L. Saunders, p. 769.

TAXATION.

Relator's judgment being founded on a contract entered into in 1873, at a time when the city possessed a power of taxation for general expenses exclusive of interest and schools, of twelve and one-half mills, it is the settled doctrine of the Supreme Court of the United States and of this Court, that, so far as necessary to the satisfaction of the contract, the same power of taxation continues to exist, irrespective of subsequent legislative or constitutional restrictions.

This Court has heretofore held that the writ of mandamus remained a proper and subsisting remedy to compel the city authorities to perform the duties imposed upon them by Act No. 5 of 1870. 30 Ann. 129.

In the same case it was held that the said act imposed upon the administration the absolute duty to provide in their annual budgets for the payment of registered judgments so far as not interfering with the necessary alimony of the city. The duty to provide implies and includes the duty to exercise the power of taxation conferred by law, to the extent necessary to furnish the means for such provision.

TAXATION—*Continued.*

The city having, for the purposes of this contract a power of taxation of two and one-half mills, not applicable to alimony, and not exercised, it is her duty to exercise it to the extent necessary to provide for payment of this judgment, unless she otherwise provides for such payment.

Under the law in existence at the date of this contract, the city's liability was not restrained to the revenues of the year in which the debt was contracted.

Section 2786 Revised Statutes has no application to this case. If it had, its effect is foreclosed by the judgment.

The State ex rel. Marchand et al. vs. New Orleans, p. 14.

Property used for rice-milling purposes is not exempt from taxation. 36 Ann. 347, affirmed.

Martin & Shayot vs. Thibaut, Tax Collector, p. 21.

A cemetery set apart and used for burying the dead, is a "place of burial" within the intendment of Art. 207 of the Constitution, and, as such, exempt from taxation unless leased or used for purpose of private or corporate profit or income.

The cemetery of plaintiff is not leased, nor is it used for any purpose of profit or income. The fact that lots in the same are sold to persons for purposes of interment, does not constitute a *use* of the property within the meaning of the law. The property here assessed, is the unsold portion of the cemetery. It has neither been used or sold for profit, and, even if the latter were a use the condition of its exemption has not been broken.

Under the law of the State, shares of stock of corporations are only taxed on the surplus of their value above the value of the real estate belonging to the corporation. As the proof is perfect that the stock represents absolutely nothing but the value of the exempted real estate, it is clear that there can be no surplus value of the stock for taxation.

Metairie Cemetery Association vs. Assessors, p. 32.

The license for keeping a fixed place for concert, dancing and variety performances is one thousand dollars. The act of 1882 imposing that license is constitutional. State vs. O'Hara, 36 Ann. 93, affirmed.

When an appeal is taken from a judgment for the amount of the license manifestly for delay, ten per centum upon the amount of the license will be adjudged as damages for a frivolous appeal.

The State vs. O. H. Schonhausen et als., p. 42.

TAXATION—*Continued*

Act 12 of 1875 conferring upon the State Board of Assessors the power of making the assessment for the city of New Orleans as well as the State, did not abolish distinctions established by existing laws between the subjects of taxation falling under the taxing power of city and the State respectively. Hence the assessment rolls for each were not necessarily counterparts and copies of each other, and the mere fact that they differed from each other, did not, of itself, invalidate either.

The law authorized the assessments under the head of "capital," all capital of corporations "not invested in real estate," and such assessment is not void for defective description because not setting out the particular items and objects in which the capital is invested. 32 Ann. 21; 31 Ann. 477.

Complaints of mere excessive valuation of taxable property in the assessment, cannot be listened to as a defense to a suit for the tax. If appeal on such questions be made to the courts, the action must be directed against the Board of Assessors.

The capital stock of defendant is not exempt from taxation under Act 42 of 1874.

New Orleans vs. N. O., St. Louis and Chicago R. R. Co., p. 45.

The property of the New Orleans Female Orphan Asylum is entitled to the same exemption from taxation which has been extended to, and judicially recognized in favor of the Poydras Orphan Asylum. Act No. 96 of 1844; 33 Ann. 850.

That exemption extends to other property, such as stores owned by the corporation and rented for revenue, which is used exclusively for the charitable purpose of maintaining the asylum, as well as to the property actually used and occupied as an asylum.

N. O. Female Orphan Asylum vs. State Tax Collector, p. 68.

The assessment of the property of a tax payer on the rolls and the modes used in fixing its value, are presumed to be correct until he establishes the reverse.

The income derived is not always the proper criterion.

That rule surely does not apply to exceptional property, which is not designed to yield a rental or commercial purposes, but destined wholly, or mainly, for personal use, benefit and gratification.

Real estate subjected to a servitude does not cease to belong to the grantor who continues to own the same and who can dispose of the same as he may please, provided he does not thereby interfere with the enjoyment of the servitude by the creditor thereof.

N. O. Cotton Exchange vs. Board of Assessors, p. 423.

TAXATION—*Continued.*

A contract with the city of New Orleans passed after the adoption of the constitutional amendment of 1874, was restricted for satisfaction to the revenues for the year and imposed no obligation upon the city to exercise in the future the then existing power of taxation in order to pay it.

The Article 209 of the Constitution of 1879, limiting the rate of municipal taxation, violated no obligation of such a contract; and as against a judgment founded thereon, the Constitution is entitled to as plenary effect as if the judgment had not been founded on contract at all.

The judgment creditor, therefore, cannot, by mandamus, compel the city to levy a tax for his satisfaction in excess of the constitutional limitation.

The State ex rel. N. O. Gaslight Co. vs. New Orleans, p. 436.

The constitutionality of a tax is in contestation when the law under which it is imposed contravenes some constitutional provision, or when the property assessed and sought to be taxed is exempt by such provision.

The legality of a tax is contested when it is claimed there is no law authorizing it, or that the statute authorizing it is invalid, or that it has been imposed in violation of a valid law.

Where the complaint is of the irregularity of want of form of the assessment or of its timeliness, neither the constitutionality nor legality of the tax is contested and the Supreme Court has not jurisdiction unless the amount involved confers it.

Adler, Goldman & Co. vs. Board of Assessors et als., p. 507.

The power of taxation of a municipal corporation and its extent at the date of a contract are incorporated in and become a part of the contract, and continue to exist for its enforcement regardless of, and in opposition to, any subsequent restriction or limitation of that power.

Under the Act of 1870 it is the duty of the municipal authorities of New Orleans to provide for the payment of registered judgments in the only mode in which her judgment creditors are permitted to enforce their judgments, and this duty is not discretionary but imperative. If the city fails or refuses to perform it she will be compelled to do it under a mandamus.

The State ex rel. Thorn vs. New Orleans, p. 528.

The fifth municipal district of New Orleans, known as Algiers, being included in the levee system specially created for New Orleans by

TAXATION—*Continued.*

law, could not be legally included in the third levee district of the State.

Hence said district is not liable to the special levee tax levied under the authority of said third levee district.

M. Abascal et al. vs. P. L. Bouny et al., p. 538.

Even if private bankers stood upon the same footing as incorporated banks, and were subject to the same rules of assessment as to their capital, and were to be taxed only upon the surplus of their assets over their debts, they could not escape taxation by simply investing a portion of their assets, equivalent to such surplus, in non-taxable United States bonds; but such bonds, though themselves non-taxable, would nevertheless be counted as a part of the assets and as offsetting, to that extent, the liabilities. 29 Ann. 851.

The claim of relators being thus untenable, on their own theory, it is unnecessary to consider the more radical contentions advanced by defendants herein.

The State ex rel. Jacobs vs. Assessor et al., p. 850.

A sugar planter who keeps a store on his plantation must pay a license as retail dealer, where, though the bulk of the sales are made to employes on the plantation, yet other persons are not forbidden to purchase from the store.

Nor is there any legal authority for graduating such license by the amount of sales made to the public *i. e.* to persons not employed on the plantation.

Thibaut, Sheriff, vs. J. Dymond, p. 902.

The shares of stock of the New Orleans Cotton Exchange have a money value independent of and in addition to the privilege of membership which the ownership of them may secure to the holder. They may be owned and held by a person not a member of the Exchange, and when so held are received as collateral or as pledges by banks, and other money lending institutions. They are bought and sold as other stocks are and are therefore included in the taxable property of the holder and owner of them as being a thing possessing money value.

The law authorizing subsequent assessment of property which had been omitted from the rolls in past years applies only to property which had been unlawfully and erroneously omitted, and not to property which was not assessable under the law in force in those years. The assessment of property in 1882 was gov-

TAXATION—*Continued.*

erned by Act 77 of 1880; and the provisions of Act 11 of 1882, so far as assessments were concerned, applied only to future years.

This Court having held that the stock of the Cotton Exchange was not assessable under the act of 1880, it follows that it was lawfully omitted from the rolls of 1882 and cannot by subsequent proceedings be assessed for that year.

A. Schreiber vs. Board of Assessors, p. 908.

TAX COLLECTORS.

In the absence of legislation to that effect, tax collectors are not entitled to make deductions for charges and expenses incurred by them from the amounts realized by or chargeable to them.

Mere delay in taking steps against a defaulting tax collector does not release his sureties when no time or prolongation is allowed by the State herself, and by the delay their rights to a subrogation is not impaired.

The law regulating the relations between the State, through her fiscal agents, and the gatherers of her revenues, is one of extreme rigidity which must be strictly enforced. Under them and under the contract evidenced by the official board the accounts have to be promptly and faithfully rendered at the appointed time and in the proper manner; otherwise the principal becomes a defaulter, and his sureties are liable with and for him in the mode and to the extent stipulated.

The State ex rel. etc., vs. Guilbeau et als., p. 718.

The revenue laws require of tax collectors the performance of certain acts as conditions precedent to the allowance of deduction lists as credits in their favor. They must have verified these lists with an oath that they had exhausted all legal means for the collection of the sums upon them, and must have deposited them in the recorder's office, on or by the first of November of each year.

Unless they comply with these requirements they are not legally entitled to be credited with the amount of these deduction lists.

The State vs. T. Viator, et als., p. 734.

TAX SALES.

The only duty imposed on the tax collector which is declared by Section 1 of Act 98 of 1882, to be "mandatory and imperative," is the duty "to proceed immediately after the promulgation of this act to prepare the necessary records." The following words "and (he) shall, within four months after said promulgation advertise for sale, etc." is grammatically independent of the declaration of "mandatory and imperative duty," and is, therefore, a seperate and merely directory provision.

TAX SALES—*Continued.*

This construction is in harmony with the provisions in Section 11 of the act, "that if any tax collector shall, *after* four months from the promulgation of this act, fail to advertise, etc.," which obliviously contemplates advertisements *after* the four months, and excludes the theory that the power to advertise expired with that period.

The provision being directory merely, failure to advertise within the four months does not, necessarily, involve the nullity of advertisements subsequently made, in absence of any proof of culpable delay.

The description of the property sold in this case, however, as contained in the advertisement, does not comply with the requirements of Section 3 of Act 98 of 1882 and Section 20 of Act 96 of 1877 and the sale is, therefore, null.

Mrs. Bell vs. B. W. Taylor et al., p. 56.

A tax sale of property sold at a previous tax sale, which is itself shown to be null, can convey no title.

Mrs. Gibson vs. Bennett Hitchcock et al., p. 209.

Where a tax sale has been declared a nullity, the purchaser at such sale is entitled to reimbursement of the capital, interest and penalties he has paid, unless where the assessment of the property was radically defective or other essential legal requisites not complied with, in which last case only the principal and interest of the taxes paid can be recovered.

Whatever presumptions in favor of tax deeds may attach under the provisions of the Constitution, they have no application to tax-deeds which have been decreed null and void. In order to recover penalties paid under a void tax sale, the plaintiff must prove the validity of the assessment, and having failed to make such proof, his claim to that extent is non-suited.

L. Fishel vs. A. Mercier, p. 356.

The good faith necessary to enable a claimant under a tax title to plead prescription is simply that he shall not have acquired the property *mala fide.* Where the tax deed is valid in form and there is no defect stamped on its face and the sale has been made by the proper officer, the purchaser is a possessor in good faith.

A possessor and owner cannot be deprived of his right to plead prescription because he might by inquiry and careful examination have discovered that his vendor had no title. The constitutional direction that all deeds from tax collectors for land sold by them for taxes shall be received as *prima facie* valid has placed tax titles

TAX SALES—*Continued.*

on the same footing as other titles under judicial sales and subjected them to the same rules as sheriff's deeds.

Before that constitutional change was made, an assessment could not be presumed but must be proved. By virtue of that change it is presumed without proof and *prima facie* tax deed is valid. If that deed is valid in form and the defect is want of authority or right in the officer to make it, and not in the manner of making it, the knowledge that the officer had no right to make the sale is not brought home to the purchaser.

No symbolic ceremony such as livery of seizin at common law is necessary to constitute a taking possession of land. The authentic act of sale of land described by location, extent, etc., is a taking possession of it and a notice to the world that he who thus claims it claims as owner. Especially is this true of land in a state of nature with forest unreclaimed.

The purchaser at a tax sale in good faith who has a title from the competent and proper officer in valid form, with no defect stamped upon it and patent, and who has possessed by himself, or by himself and his authors ten years, has acquired an indefensible title and may successfully defeat the claim of the original owners thereto.

Giddens, Executor, vs. M. Mobley et als., p. 417.

THINGS.

The right of a party who has erected works or improvements on the soil of another, to claim compensation therefor, cannot be exercised as long as the owner of the soil has not elected to keep such constructions or improvements.

Citizens' Bank vs. Maureau et als., p. 857.

THIRD OPPOSITION.

A third opponent claiming property seized under execution, cannot attack the judgment of the seizing creditor or the proceedings under it, unless he first establish his right or title to the property.

If he is the owner of it, his right thereto must prevail, however valid the judgment of the creditor and the proceedings under it. If he is not the owner, he is without interest to attack the right of the creditor making the seizure.

A conveyance of real estate, to have effect against third persons, must be properly recorded in the parish where the property is situated.

Mrs. L. Coleman vs. F. H. Coleman, p. 566.

TRADE MARK.

The petition of a citizen of the republic of France, asserting the right of ownership to a trade mark, discloses no cause of action in the

TRADE MARK—*Continued.*

absence of specific averment that copy of the mark was deposited, as required by the second article of the convention between the United States and France, proclaimed on April 16, 1869, in the Patent office at Washington.

L. Lacroix vs. M. Escobal, p. 533.

USUFRUCT.

In an action by the joint owners of property, held in usufruct by their father, for the purpose of destituting him of the usufruct, on the grounds of acts of abuse and waste, it is not sufficient to show that the father has parted with or spent some or all of the funds originally belonging to the community, and that he has made donations of a portion of the lands belonging to the community.

Money is the subject of imperfect usufruct, and the usufructuary is authorized to spend it subject to an accounting at the end of the usufruct.

If the lands donated by the father exceed in quantity or in value his legal interest, the donation will be reduced or annulled at the final liquidation of the community, but the donation cannot give rise to a judicial destitution of the usufruct.

Heirs of M. Gryder vs. H. Gryder et als., p. 638.

WILL.

A nuncupative will by public act which does not contain express mention that it was *written* by the notary, is a nullity. The omission to so declare is fatal, as it cannot be supplied by testimony *aliunde.*

The law imperiously exacts not only that the prescribed formalities be observed, but also that an explicit recital be made that they have been fulfilled; and this under pain of nullity of the act.

Succession of Louisa Dorries, p. 833

WARRANTS.

Where a preference in payment has been given by the Legislature to the warrants for an appropriation over all warrants upon the General Fund or over certain specified warrants thereon, the holders of such preference warrants are entitled to be paid in accordance with such provision subject to the pre-payment of the Constitutional and University warrants.

Where the residue of the General Fund, after payment of these two classes of warrants, and the payment of those warrants to which legislative preference has been given, is insufficient to pay in full all other appropriations, they must share such residue *pro rata.*

The State ex rel. H. Bier vs. Burke, Treasurer, p. 434.

WHARFAGE.

Wharfage dues are not taxes or duty of tonnage, or regulations of commerce, or obnoxious to the Constitution of the United States. but are lawful charges for conveniences furnished to commerce.

Neither are they a tax, toll, or impost, within the meaning of the State Constitution.

The Supreme Court has no jurisdiction over a cause, in which such dues are claimed, for an amount below that fixed as the inferior limit of its jurisdiction. *James Sweeney vs. Henry Otis, p.* 520.

A charge of wharfage dues for artificial facilities furnished by a city or town in order to promote the convenience of loading and unloading ships and other vessels, is not amenable to the prohibitions contained in Sections 8 and 10 of Art. 1 of the Constitution of the United States.

But such a charge will not be maintained and enforced unless it appears from the evidence that it rests on services rendered by the corporation to vessels or boats by means of wharves or wharfage facilities provided and maintained at the expense of the corporation, and by means of which the loading and unloading of boats or vessels is materially and specially facilitated.

Works by which the general commerce of a city, including the shipping, is benefited, will not justify a charge for wharfage against the owners of ships or other vessels.

Shreveport vs. Red River and Coast Line, p. 562.

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